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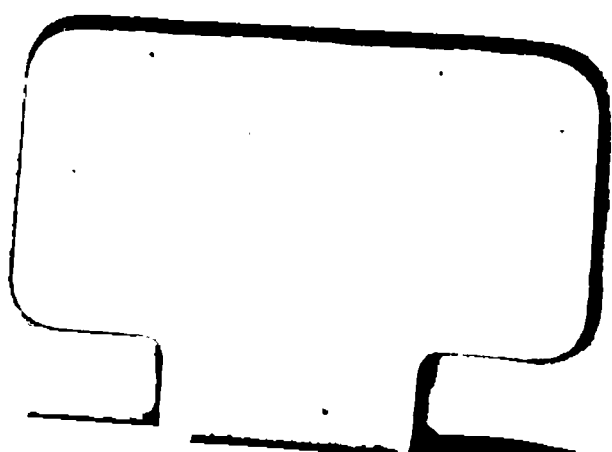
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FORMS

OF

DECREES IN EQUITY,

AND OF

ORDERS

CONNECTED WITH THEM,

WITH PRACTICAL NOTES,

BY

HENRY WILMOT SETON,

OF LINCOLN'S INN, BARRISTER AT LAW.



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TO THE
RIGHT HONOURABLE JOHN SINGLETON,
BARON LYNDHURST,

OF LYNDHURST,

IN THE COUNTY OF SOUTHAMPTON,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

THE FOLLOWING WORK

IS,

WITH HIS LORDSHIP'S PERMISSION,

RESPECTFULLY INSCRIBED.

For the following observations upon the early Decrees of the Court of Chancery, the Author is indebted to Mr. BEAMES.

He avails himself of this opportunity of returning thanks to his Professional Friends generally, for their obliging communications.

OBSERVATIONS
UPON THE
E A R L Y D E C R E E S
OF THE
COURT OF CHANCERY.

THE decrees of the Court of Chancery have varied in form at different periods. Much valuable information upon this subject may be derived from the “Calendar of the Proceedings in Chancery, in the reign of Queen Elizabeth,” published in the year 1827. That work contains several decrees, a few of which it may be useful to mention.

In *Reed and Wife v. the Prior of Launceston*, p. 114, (Richard the Third’s reign) there is a decree of dismissal with costs, because the plaintiffs did not appear at the hearing, with a direction that one writ of attachment should issue. And in *Broddesworth v. Coke*, p. 67, and *Slefeld v. Grafton*, p. 97, (Edward the Fourth’s reign) there are decrees of dismissal.

In *Stokker v. Colyns*, p. 97, (Edward the Fourth’s reign) there is another decree of dismissal, the Chancellor being assisted *cum justiciis et aliis de dcī Domini Regis consilio*.

In another instance, p. 86, the decree is stated to be made *per avisamentum justicii, servientum ad legem, attornati, et*

alior. de consilio dcī Domini Regis, in Cam. Sccrii, vocat. "Le Chekker Chambre," &c.

In *Giglis v. Welby*, p. 122, (Henry the Seventh's reign) and in *Mayhewe v. Gardener*, p. 99, (Edward the Fourth's reign) are decrees for payment of money.

In *Edyall v. Hunston*, p. 113, (Richard the Third's reign) an injunction is awarded against proceeding at law, until the matter of the bill was fully determined, or until the further order of the Court; but whether this was done by a decree may, perhaps, be questionable.

From the "Calendars" it is to be collected, that when bills were filed, pledges to prosecute, as they are termed at law, or, in other words, sureties to answer the costs, in case the plaintiffs failed, were generally required, and their names endorsed on the bills, probably with a view of giving effect to the provisions of the statute of Richard the Second, which enabled the Chancellor to award "damages according to his discretion" to those who had been drawn into litigation before him upon "untrue suggestions."—See *Beames on Costs* Eq. 4.

It is stated in the preface to the "Calendars," that the bills, or petitions, (or *supplications* as they are termed by West in his "Symboliography,") commence in the 17th of Richard the Second, the year in which the above statute passed; and, as the author of the preface adds, "it is probable that the bills or petitions of this year are the first which were regularly filed."

Another curious circumstance connected with decrees is the practice of which the "Calendars" afford evidence, and which is mentioned in the preface; namely, that "for many years the usage of the court appears to have been for the defendant to be brought before the Chancellor and examined *viva voce*."

It appears that in the earlier period of the Court, the de-

crees "are generally found endorsed on the bill; a practice which continued from the time of Henry the Sixth down to that of Henry the Eighth, if not to a later period."—Pref. to Calend.

The fact itself sufficiently accounts for the general brevity of these early decrees, and for the total absence of all statement of the circumstances of the case; such statement being obviously unnecessary when the decree was endorsed on those proceedings which comprised the whole circumstances. An example of the brevity of these early decrees is afforded by the cause of *Katherine Danyell v. Richard Belyngburgh*, p. 80, (Henry the Sixth's reign): the decree is in these words—*Infrascriptus Ricardus dimissus est de Curia, quietus sine die, ex assensu partis.*

It must not be supposed, that all the decrees are equally brief. The longest, p. 128, is comprised within five chancery folios; but, upon the average, the decrees are less than half that length. The decree is sometimes preceded by the depositions of the witnesses, and not unfrequently expressed in these terms—*Consideratum, adjudicatum, et decretum est &c.* See pp. 97, 98. 100, &c.

It is, perhaps, not possible to fix the precise period when the practice of endorsing the decree on the bill ceased.

Tothill speaks of a decree on the "judgment roll" of 86, 87, and 88 of Henry the Eighth. Some persons may think that by the expression "judgment roll," he alludes to a decree endorsed on the bill, or to its entry in the Registrar's Book. See Toth. 56. My own impression is, that by the terms "judgment roll," Tothill refers neither to the endorsement nor to the Reg. Lib. but to the actual Rolls, containing the enrolment of the decrees; because, in the Registrar's Book of the 86th or 87th Henry the Eighth (and which includes the 1st of Ed-

ward the Sixth), I find several entries in these terms—*In causâ controversiæ inter, &c. finale decretum fit, et idem signatum manu propria Domini Cancellarii tradit., &c. attornato irrotuland.* and sometimes after *attornato*, *Croke* is added.

The earliest of the Registrar's Books now in the office is the book just mentioned, which I have seen, as I have also the two next oldest books, namely, the 3d and 4th of Edward the Sixth, and the 5th and 6th of Edward the Sixth and the 1st of Mary. The entries in these books are in general very short. They are sometimes in English, but more frequently in Latin, and written in a manner which renders it difficult to understand them. From the cursory glance I took of them, I was unable to discover any statements or recitals previously to the decretal or ordering parts. I subjoin three specimens taken from Henry the Eighth's book:—

“The matter in variance betwixt A. Smyth, plaintiff, and Manering, Mil. defendant, is dismissed out of this Court; for that A. Smyth hath not shewed in fact cause to the contrary according to the order &c.”—“It is ordered, that if Huggins do not &c. by Wednesday next, that the matter between them shall be dismissed.”—“It is ordered, that if &c. do not maintain the bill of complaint &c. on this side Monday next, the bill shall abate, and the defendants be dismissed with their costs.”

In Edward the Sixth's books there are several entries in these terms:—“This matter is committed to the Master of the Rolls (with whom a Master is sometimes associated) to be heard, and to make report thereon.”

Subsequent, therefore, to these books, and when probably the practice of endorsing the decree on the proceedings had ceased, it seems to have become the custom to abbreviate the bill and answer, and add them to the decree, and, thus ab-

breviated, the pleadings became, if not a component part of the decree, at least introductory to and explanatory of it.

During the examinations before the Chancery Commission, a difference of opinion appears to have prevailed amongst some of the gentlemen called upon to give their evidence, as to the necessity of these statements in decrees; and one of the most experienced of the Registrars had several questions addressed to him by the Commissioners upon this particular point.

From his evidence it appeared, that the Registrar's Books had been examined so far back as Sir Nicholas Bacon's time (who, I believe, was appointed about 1559); that from the most ancient times to which such examination went, the present practice of statements, or recitals in decrees, existed; and that in the oldest decrees and orders, the pleadings were interwoven with the directions;* in other words, different parts of the pleadings were introduced as prefacing different directions, although at present the entire statement is placed before the decretal, or ordering part.

As the recitals or statements in decrees do not appear in the first year of Mary, but are stated to be found in decrees in the first year of Elizabeth, I presume they must have been introduced in the former reign.

I have been furnished with a copy of the result of the search which was made on the occasion alluded to. It commences in 1552, and is extended to the year 1744 inclusive. It corroborates the representation made by the Registrar before the Chancery Commission, and contains, immediately after the year 1565, this remark :—" In the orders and decrees about

* See p. 6, *post*.

this time, where there is no statement previous to the ordering part of such decrees and orders, it appears that such orders and decrees are made very much in detail, and that previous to the several directions, a short preliminary statement is introduced to each direction."

This paper affords some evidence of the peculiar practice of the day. I allude in particular to a decree in the year 1625, in which *the Master* is directed to consider the bill and answer, and to report to the Court what "he findeth confessed in the answer, and what equities"!! At all events, it may, I apprehend, be assumed that previous to Lord Hardwicke's time, the mode of drawing up decrees had become very lax, and that by the introduction of recitals or statements, much had very uselessly been added to the length of decrees.

To correct this evil, it forms part of the order made by that great judge, that "in original decrees and orders made on hearing of causes, the recitals previous to the exhibits read, be of the substance and scope only of the pleadings, tending to the points in controversy upon which the decree is founded, and be made in the most concise manner, and not to contain any recitals immaterial to the points in question."* The same order extends to other statements and recitals. (Ord. Ch. Ed. Beam. 381, &c.) Such has been the beneficial effect of this regulation, which came into operation under the eye of Lord Hardwicke himself, that no material alteration, beyond that which necessarily flows out of the increased length of modern pleadings, appears to have taken place since the year 1743, when the order was promulgated. (Chanc. Com. p. 382.) This observation must, however, be understood as applied to the *statements or recitals* in decrees.

* See p. 6, *post*.

With respect to their ordering or judicial parts, the decrees of the present day are, generally speaking, far less explicit and much less in detail than were the decrees some time before, and even so late as, the period of Lord Hardwicke. "I copied," says Chief Baron Alexander, "when I was a young man in the profession, a set of decrees made in the time of Fortescue, when he was Master of the Rolls, and many of my Lord Hardwicke's time, and in them there were full directions ; but what the origin of that was I cannot say : it is certainly a very ancient course of direction. There are in that collection many decrees in which they pursue the thing throughout, so as almost to render any application to the Court for further directions unnecessary ; whereas certainly the modern decrees are quite of a different stamp ;" and he afterwards adds, that " Sir Thomas Sewell gave very particular directions in the old form ; I think after him it ceased at the Rolls."—(Chanc. Com. p. 346.) * An instance of the minuteness of the directions given by Sir Thomas Sewell is to be found in Mr. Blunt's valuable edition of Ambler, being the decree, taken from the Registrar's Book, in the cause of Price v. Fastnedge. Ambler, p. 686.

* See p. 37, *post*.

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FORMS OF DECREES,

&c. &c.

DECREES GENERALLY.

The judgments of the Courts of Law are usually simple in their form, as that the plaintiff do recover his seizin, term, &c. (1)

But decrees of Courts of Equity, from the nature of the relief given by them, and the number of parties often interested in it, are necessarily more complicated. (2)

In the separate branches, however, of equitable jurisdiction, they are not without uniformity; and upon this ground are frequently referred to as regulating the practice of the Court. (3)

With this view, and with a view to the preservation of that uniformity, a collection of the common forms of decrees, and of the orders connected with them, may not be without use.

It may also be useful with a view to framing bills, the prayer of the bill being that part upon which the frame of it principally depends, and the decree being obviously the best guide to the prayer.

What follows is intended rather as an essay towards such a collection than as a complete one.

NOTES.

(1) The judgment in a writ of right, is, that the plaintiff recover his seizin. See 3 Bl. Com. Appendix, No. 1. In ejectment that the plaintiff recover his term, &c. Ib. No. 2. In debt, that the plaintiff recover his debt, &c. Ib. No. 3. In assumpsit, covenant,

&c., that the plaintiff recover his damages, &c. See Tidd's Practice, 938. And see Tidd's Appendix, title "Judgments."

(2) See 1 Wooddeson's Lectures, 203.

(3) See, among other instances, what is said by the Master of the Rolls in *Crickett v. Dolby*, 3 Ves. 13. and by the Lord Chancellor in *Willan v. Willan*, 19 Ves, 593. and as to the general utility of consulting decrees, see what is said by the Lord Chancellor in *Milnes v. Slater*, 8 Ves. 303.

INTERLOCUTORY DECREES.

Decrees are either interlocutory or final. 3 Bl. Com. 452. In strictness, a decree is interlocutory until it is signed and enrolled. See Gilb. For. Rom. 183.

But ordinarily a decree is termed interlocutory where it is pronounced for the purpose of ascertaining matter of law or of fact previous to a final decree. See 1 Newl. Pract. 322.

In interlocutory decrees the consideration of the particular question to be determined, or of further directions generally, is reserved by the decree. See 1 Newl. Pract. *ib.* and Reservation of further Directions, *post.* And the further hearing is termed upon Further Directions or upon the Equity Reserved.

It seems that a preliminary direction at the hearing with a view to inquiry is not properly a decree, but a decretal order. See *Horwood v. Schmedes*, 12 Ves. 315.

Decrees or decretal orders are also termed interlocutory where they are made on motion before the regular hearing.

Upon the ground that the decree is interlocutory until enrolment, rehearings are permitted. Gilb. For. Rom. 183.

And upon this ground, evidence is permitted to be read upon a rehearing, which was not read on the original hearing. *Wright v. Pilling*, Pre. in Chan. 496. S. C. Gilb. Rep. 151. And see *Needham v. Smith*, 2 Vern. 464. *Hedges v. Cardonnel*, 2 Atk. 408. *Cunyngham v. Cunyngham*, Ambl. 90. *Dashwood v. Lord Bulkeley*, 10 Ves. 236. *Huddleston v. Briscoe*, 11 Ves. 593. *Buckmaster v. Harrop*, 13 Ves. 458.

Williams v. Goodchild, 2 Russ. 91. Though not upon an appeal. **Williams v. Goodchild, *supra*.** **Addison v. Hindmarsh, 1 Vern. 442.**

So upon a rehearing, exhibits are permitted to be proved *vivâ voce*. **Gilb. For. Rom. 183.** **Walker v. Symonds, 1 Mer. 37, note.**

And leave may be obtained for the proof of new matter. **Gilb. For. Rom. 183.** **White v. Fussell, 1 V. & B. 153.** **Williamson v. Hutton, 9 Price, 194.** **Williams v. Goodchild, 2 Russ. 91.** **Wyld v. Ward, 2 Younge & Jervis, 381.**

But new matter cannot be put in issue. **Thomson v. Walter, Pre. in Chan. 295.** Or a new case made. **Wood v. Griffith, 1 Mer. 35.** **S. C. 19 Ves. 550.**

See Propositions on this subject—Introductory part of Decrees, *post*.

Interlocutory decrees or orders cannot be pleaded. **Senhouse v. Earl, 2 Ves. 450.** **Sheriff v. Sparkes, 1 West, 130.** **Brandlyn v. Ord, 1 Atk. 571.** **S. C. 1 West, 512.**

At law a writ of error can only be brought on a final judgment; but in equity an appeal lies from interlocutory orders. **3 Bl. Com. 55.** **Wall v. Attorney General, 11 Price, 668. (1)**

An appeal, however, cannot be brought from an order to show cause not made absolute. **Nagle v. Foot, 4 Bro. P. C. 368.** And see Decrees by Default, *post*.

The following Propositions, with a view to extend the power of the Court in pronouncing interlocutory decrees or decretal orders upon motion, are among those subjoined to the Report of the Commissioners upon the practice of the Court of Chancery:—

Proposition 137.—That wherever after answer it is apparent from the pleadings that some certain decree must necessarily be made at the hearing, there, without further proceeding being had, the court may in its discretion make an order to the effect of the decree, which would be made at the hearing if the cause were regularly prosecuted upon the summary application of any party to the suit, or of any person directly interested in the suit, although not a party thereto, as a creditor or legatee where the suit is for the administration of assets.

Forms of Decrees.

Proposition 138.—That when all the answers in a cause are filed, it shall be competent to the court, if it shall deem it expedient, by interlocutory order made upon the motion of any party, to direct any inquiry as to the matter of the cause, or any accounts in the cause, in order that pending the making of such inquiry, or the taking of such accounts, the plaintiff may proceed in the preparing the cause for hearing ; and that if the Master's report shall be made before the cause shall come on to be heard, it may at the same time be heard upon the subject of the said report, as well as upon the other matters in issue.

NOTE.

(1) For a protest against an appeal from an interlocutory order. See *Grenville v. Elwes*, 1 Chandler's Debates, House of Lords, 103.

By the civil law no appeal lies but from a definitive sentence, or what is termed "Gravamen Irreparabile," but by the canon law (as in equity), an appeal lies from any sentence. See *Exp. Blunt*, 1 Atk, 295. S. C. 1 West, 27.

The rule of the civil law is adopted in the Admiralty Courts, S. C., and that of the canon law in the Ecclesiastical Courts.

Decrees consist of the Introductory Part and the Ordering Part.

No. I.

ORIGINAL DECREE.

INTRODUCTORY PART.(1).

John Southwood, } THIS cause coming on the 4th instant, [In margin
plaintiff: Grace } as also on this present day, to be heard and of decree]—
Fry and Peter Fry, } debated before the Right Honourable the “ Lord
defendants. (2) } Lord High Chancellor (3), in the presence
of counsel learned on both sides, the substance of the plaintiff’s
bill appeared to be that, &c. Therefore that the defend-
ants, or one of them, may, &c. and to be relieved is the scope
of the plaintiff’s bill. Whereto the counsel for the defendants
alleged that they by their answer, &c. (4) Whereupon and
upon debate of the matter, and hearing the will of P.D., dated
the 12th day of June, 1710, and the defendants’ answers, and
the proofs (5) taken in this cause read, and of what was alleged
by the counsel on both sides, his Lordship doth think fit, and
so order and decree (6) that, &c. Southwood v. Fry, L. C.
6 April. 1747. Reg. Lib. B. 1746. fol. 364.

And see Harr. 327.

NOTES.

(1) The decrees which follow are taken from the entries in the Registrar’s books, kept in the Report Office. The decrees are entered alphabetically according to the names of the plaintiffs. The books marked A. contain the entries from A. to K. inclusive. Those marked B. contain the rest. The year begins with Michaelmas Term; so that, according to the modern computation, the date of the decree does not correspond with that of the book, except in Michaelmas Term.

The folios in the books are numbered, but not the pages.

(2) The parties should have the same descriptions as in the bill. Curs. Canc. 359.

(3) If the cause is heard upon bill and answer, it should be so stated. See Harr. 328.

(4) *The Recital of the Pleadings.*

Anciently the pleadings were interwoven with the directions ; more recently the entire statement was placed first, and the order afterwards. See Mr. Walker's evidence, Report of the Commissioners upon the practice of the Court of Chancery, Appendix, A. p. 322.

Decrees ought to be drawn up as short as may be with convenience, and not to recite the pleadings largely, but only the sum of them briefly. See Curs. Canc. p. 353.

The following orders have been made on this subject :—

By the orders of the Lords Commissioners, A. 1649, Beames Appendix, 501. It is ordered that no decree shall recite the bill, answer, pleadings, or depositions, or any of them *verbatim* ; but only the short state of the matter, and the decretal order, and the opinion and judgment of the Court.

And by an order of Lord Hardwicke, Beames, 381. It is ordered that in original decrees and orders made on hearing of causes, the recitals previous to the exhibits read, be of the substance and scope only of the pleadings, tending to the points in controversy upon which the decree is founded, and be made in the most concise manner, and not to contain any recitals immaterial to the points in question.

The following observations as to the recital of the pleadings, are contained in the Report of the Commissioners upon the Practice of the Court of Chancery.

“ We have taken some evidence, and have had much consideration as to the propriety of establishing a shorter mode of drawing up decrees than is now in use. We find that in the opinion of very many experienced persons, the advantage of having the nature and substance of the case set forth in the document which contains the decision, overbalances any evil which results from its length ; and we do not propose any new rule as to the form of decrees, although we wish strongly to enforce the propriety of greater attention than appears now to be paid to the terms of Lord Hardwicke's order in this behalf. See Report, p. 18.

For further, as to recitals. See Further Directions, *post*.

By the orders of the Court of Exchequer, every order and decree

is to be drawn up as short as with conveniency they can be, without reciting the former orders and pleadings at large. Rules and Orders of the Exchequer, 32.

Effect of the Recitals of the Pleadings.

Previous to the enrolment of the decree the parties are not bound by the recitals of the pleadings, Gilb. For. Rom. 210.

But after the enrolment, which is taken from the record of the bill and answer, they are bound, Ib.

Where the decree is given in evidence at law, it seems to have been held, that proof of the bill and answer might be dispensed with, where they were recited at length in it. See Com. Dig. "Evid." C, 1. Phillipps on Evidence, 393. Peake's Evidence, 70. and note.

And see Exemplification of Decree, *post*.

(5) The Recital of Evidence.

See orders of the Lords Commissioners, A. 1644. *ante*.

The recital of the evidence read is general, as well as that of the reading of the answer.

In *Brend v. Brend*, 1 Vern. 214. The Lord Chancellor said that he would not allow of this practice, but that the facts that were proved, and allowed by the Court as proved, should be particularly so mentioned in the decree; and see *Bonham v. Newcombe*, 1 Vern. 216.

But the practice has continued.

See effect of the recitals of the evidence, *post*.

The following propositions on this subject are among those subjoined to the Chancery Report:—

Prop. 183. That all decrees shall contain a precise statement of the particular evidence read and used, distinguishing therein from folio to folio the part of the answer or deposition which was read and used, and that it be the duty of the registrar to make a note in his book of all evidence which is tendered, whether it be received or rejected.

The object of this proposition is to give effect to that which precedes it (see explanatory paper subjoined to the report, p. 114.), which is as follows:—

Prop. 182. That all appeals from the decisions of the Master of the Rolls and Vice-Chancellor to the Lord Chancellor shall be heard and disposed of upon the same evidence as was used or read

Forms of Decrees.

before the Master of the Rolls and Vice-Chancellor, and upon no other or additional evidence, unless the appeal be on account of the rejection or admission of evidence.

In the Exchequer it is the practice (though not invariably) to state the evidence read specifically in the decree.

Effect of the Recitals of the Evidence.

Upon a demurrer to a bill of review, the parties are bound by the recitals of the evidence contained in the decree. *Combes v. Proud*, Freem. 182. S. C. 2 Eq. Abr. 174. And see *Collwell v. Child*, Freem. 154.

But not, it seems, unless the evidence is particularly stated. *Bonham v. Newcomb*, 1 Vern. 216.; and see *Brend v. Brend*, 1 Vern. 214.

And after a demurrer overruled, the cause is equally open as upon a rehearing. *Catterall v. Purchase*, 1 Atk. 290. S. C. 1 West, 447.

In *O'Brien v. Connor*, 2 Ba. & Be. 154. it is said, that if there were a fact misunderstood by the Court, and not introduced into the decree as a fact proved in the cause, that might be a ground for an appeal.

But in *Lodge v. Manby*, House of Lords, 9th and 20th June, 1825, *ex relatione* Mr. Mathews, on appeal from the Court of Exchequer, the decree having omitted to notice evidence, which, though tendered and relied on by the respondent, had not been actually read, to save the time of the Court, the House of Lords directed the appeal to stand over, in order to give an opportunity to apply to the court below to correct the omission; and afterwards, upon the consent of the appellant to waive the objection, dismissed the appeal with 50*l.* costs only, and refused full costs, on the ground of the omission in the decree.

Errors in the recital of the evidence may be corrected on a rehearing. See *Combes v. Proud*, *supra*. *Catterall v. Purchase*, *supra*.

So on a motion to rectify minutes. See *Sir John Eden v. Earl of Bute*, 7 Bro. P. C. 204.

Where the evidence had not been in fact read or relied on, an order on a motion to rectify minutes for entering the evidence as read was reversed on appeal, but leave was given to rehear the cause. S. C.

(6) Grounds of Decree.

Formerly the Court, in some instances, directed the reasons for its decree to be specially entered by the registrar. See *Maynard v.*

Moseley, 3 Swan. 653. Onions v. Tyrer, 1 P. W. 343. Gibson v. Kinven, 1 Vern. 67. note.

But this practice was not usual, and has since become very uncommon. See *Ex parte Earl of Ilchester*, 7 Ves. 373.

Nevertheless the utility of it has been noticed in the like instances. See *Bax v. Whitbread*, 16 Ves. 24. *Gordon v. Gordon*, 3 Swan. 478.

And it has been sometimes adopted. See *Gordon v. Gordon*, *supra*. *Jenour v. Jenour*, 10 Ves. 573.

By Lord Bacon's orders, 44. Beames, 22. In special orders the registrars are directed to set down the reasons which moved the Court to vary from the general rule.

Declaration of Rights of Parties.

Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by it. See *Jenour v. Jenour*, 10 Ves. 568.

No. II.

**FURTHER DIRECTIONS—INTRODUCTORY
PART.**

This cause coming on the 30th day of March last to be heard and debated before the Right Honourable the Master of the Rolls, in the presence of counsel learned on both sides, upon opening and debate of the matter, and hearing the settlement made on the defendant's marriage with her late husband, dated the 15th of December, 1732, read, and what was alleged by the counsel on both sides, his Honour ordered that, &c. And all the parties were to be paid their costs, &c. and were to be at liberty to apply to this Court from time to time for further directions, as there should be occasion. That in pursuance of the said decree, the said Master made his report, dated the 19th of August last (which stands absolutely confirmed), and thereby certified that, &c. (1) And this cause coming this present day to be heard for further directions on the said report before the Right Honourable the Master of the Rolls, in the presence of counsel learned on both sides. Whereupon, and upon hearing the said decree and the said

Master's report read, and what was alleged by the counsel on both sides, his Honour doth order that, &c. *Chitter v. Chitter*, M. R. 9th December, 1747. Reg. Lib. A. 1747. fol. 96.

NOTE.

The Recitals.

By an order of Lord Hardwicke, Beames, 382. It is ordered, that in orders made on the coming in of the Master's report, or on equities reserved, nothing be recited previous to the ordering part of the original order, except such matter as necessarily leads and gives light to the order made on such reports and equities reserved, and that in the most concise manner; nor is more of such original order to be recited than what relates to the matters or points upon such occasion brought before the court.

ORDERING PART.

USUAL DIRECTIONS.

The Directions which follow frequently occur in the Ordering Part of Decrees.

No. I.

DIRECTION FOR REFERENCE TO THE MASTER.

It is ordered that it be referred to the Master in rotation (1), to inquire and state to the Court, &c. And for the better discovery (2) of the matters aforesaid, the parties are to produce (3) before the said Master upon oath all deeds (or books), papers, and writings in their custody or power relating thereto, and are to be examined (4) upon interrogatories as the said Master shall direct.

No. II.

WHERE ACCOUNT DIRECTED.

It is ordered that it be referred to the Master in rotation to take an account, &c. And for the better taking of the said account, and discovery of the matters aforesaid, the parties are to produce, &c., and are to be examined, &c. as the said Master shall direct, who in taking the said account is to make unto the parties all just allowances.

See Decrees for Account, *post*.

No. III.

DIRECTIONS IN DECREE FOR AN ACCOUNT IN THE EXCHEQUER.

In the taking of which said account the said Master is to make to all parties all just allowances. And for the better

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taking of the same, they are to produce before, and leave with the said Master all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined upon interrogatories as the said Master shall direct. For which purpose, and for the examination of parties as witnesses in aid of the said account, if necessary, the said Master is hereby armed with a commission, and one or more commission or commissions is or are to issue into the country, directed to proper commissioners, for the same purpose, if need require. And the said Master is to make his report touching the matters hereby referred to him with all convenient speed. And if, in taking the said account, any special matter shall arise, the said Master is at liberty to state the same to the Court. See *Dodwell v. Greenway*, 1 Fowl. 224.

For order for production and examination, where a corporation are defendants. See *Equity Draftsman*, 634.

For order *nisi* to confirm report. See *Hand's Pract.* 168. *Harr.* 519. *Equity Draftsman*, 600.

For order for enlarging order *nisi*. See *Hand's Pract.* 169.

For order to confirm report absolutely. See *Hand's Pract.* 169. *Equity Draftsman*, 601.

For order after enlargement of order *nisi*. See *Hand's Pract.* 170.

For order for confirming the report absolutely in the first instance by consent. See *Hand's Pract.* 171.

NOTES.

(1) Formerly references were made to a Master named in the order. But, of late, references were usually made to the Master in rotation.

(2) *Directions for Discovery.*

Where a reference is directed to the Master, the above directions are usually inserted.

Where the reference related to a fact as to which the examinations of the parties would not have been evidence (as to the law of another country) these directions were omitted. *Campbell v. Houlditch*, Appendix (1).

(3) Production of Books, &c.

The discretion of the Master extends to the production of books, &c. as well as to the examination of the parties. See *Punderson v. Dixon*, 5 Mad. 121.

This frequently appears by the terms of the order. See *Hargrave v. Richardson*, Appendix (2), and cases there referred to. And see direction for sale of real estates, *post*.

The Master's authority is not confined to directing the production of books, &c. but he may direct that they shall be left in his office, *Henna v. Dunn*, 6 Mad. 340. *Sidden v. Liddiard*, 1 Sim. 388. and by Lord Lyndhurst's orders, 60. 2 Russ. (Appendix), 21. It is ordered, that where by any decree or order of the Court, books, papers, or writings are directed to be produced before the Master for the purposes of such decree or order, it shall be in the discretion of the Master to determine what books, papers, or writings are to be produced, and when, and for how long they are to be left in his office; or in case the Master shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then that he may give such directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

Where the Master is satisfied with the production, but the party is not, the Master will not be ordered to certify. *Cotton v. Harvey*, 12 Ves. 391. But leave will be given to file further interrogatories for the examination of the party, S. C. And see *White v. Lupton*, there cited.

Exceptions do not lie to the Master's certificate, but a motion should be made to quash it. *Jones v. Powell*, 1 Sim. 387.

Where the purposes of the production of books, &c. are satisfied, an order may be obtained for the redelivery of them.

For orders for this purpose. See *Hand's Pract.* 137. 155, 156.

For certificates of delivery out. See *Ib.* 264. 265.

Inspection of Books of Bank, &c.

Upon the certificate of the Master that it is necessary, for the purpose of answering the inquiries directed by the decree, the Bank of England will permit the inspection of its books, &c. *Brace v. Ormond*, 1 Mer. 412.

Orders have frequently been made by the Court for leave to inspect the books of the Bank and the South-Sea Company for the

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purposes of the suit, although the Bank, &c. were not parties, *Whorwood v. Scott*, Appendix (3). *Lethieuller v. Tracey*, *Ib.* and see *City of London v. Thomson*, 3 Swan, 265. note.

(4) Examination of the Parties.

In *Cowslade v. Cornish*, 2 Ves. 270. S. C. (*Cornish v. Acton*) 1 Dick. 149. it was said by Lord Hardwicke, that it was in the discretion of the Master, whether the defendant should be examined. But in *Ex parte Charter*, 2 Cox, 168. on a reference in bankruptcy with liberty to the Master to examine the parties as he should think fit, the Master having declined to examine the petitioning creditor, was directed, on exceptions to his report, to state whether any application had been made to him for that purpose, and upon what grounds he had refused so to do.

Interrogatories.

The Interrogatories are to be settled by the Master, and need not be signed by counsel. Harr. 475. *Purcell v. M'Namara*, 17 Ves. 434.

For the Master's certificates of allowance of interrogatories. See *Hand's Pract.* 261, 262.

Exceptions to Certificate.

In *Strange v. Thomas*, Rolls, 18th Nov. 1747. Reg. Lib. B. 1747. f. 19. an exception to the Master's certificate of having settled interrogatories for the examination of a party was allowed; and in *Hughes v. Williams*, 6 Ves. 459, the Lord Chancellor thought that exceptions would lie.

But in *Stanyford v. Tudor*, 2 Dick. 548. Lord Thurlow, after referring to the Master of the Rolls, had held that such an exception would not lie, but that the proper course was for the party to put in his examination, which might be referred, and an exception taken to the report as to its sufficiency.

In *Purcell v. M'Namara*, 12 Ves. 171. the Master of the Rolls seemed to question the authority of this case; but in *Paxton v. Douglass*, 16 Ves. 243. the Lord Chancellor referred to it, and observed that the objection (as in the case of a witness) was not to putting the question, but to answering it when put, and in that case disallowed the exception.

And see *Examination, infra.*

Examination.

In Harr. 475. it is said that the examination must be signed by

counsel. But in *Bonus v. Flack*, 18 Ves. 287. the Lord Chancellor said that there was no order requiring it, and held that it was not necessary. In *Keene v. Price*, 1 S. & S. 98. the Vice Chancellor held that the examination of an officer of the court, as a sequestrator did not require the signature of counsel.

If the party is not in a state of mind competent to put in his examination, the court will appoint a person to put it in for him. *Page v. Page*, 1 Newl. Pract. 325.

For order for commission to take examination. See *Hand's Pract.* 135.

For a commission to examine parties in the Exchequer. See 2 Fowl. 295.

The time for the return of the commission should be left to the Master, not limited by the order. *Hairby v. Emmett*, 5 Ves. 683.

Sufficiency of Examination.

Formerly, if the examination was insufficient, an order might have been obtained to refer the interrogatories and examination to the Master. See *Interrogatories, supra*. *Harr.* 475. *Purcell v. M'Namara*, 12 Ves. 166.

But now by Lord Lyndhurst's orders, 73, 2 Russ. (Appendix), 24. It is ordered that if any party wishes to complain that any examination taken in the Master's office is insufficient, he shall be at liberty without any order of reference by the court to take out a warrant for the Master to examine such matter.

By Lord Lyndhurst's orders, 74, 2 Russ. (Appendix), 25. It is ordered, that the Master in deciding on the sufficiency or insufficiency of any answer or examination, shall take into consideration the relevancy or materiality of the statement or question referred to.

Exceptions to Certificate.

Exceptions will lie to the Master's report of the sufficiency of the examination. See *Interrogatories, supra*. *Purcell v. M'Namara*, 12 Ves. 166.

An exception in general terms is sufficient. *S. C. Lucas v. Temple*, there cited.

But the Master of the Rolls observed upon the inconvenience of the practice, and that the proper course would be (as in the case of costs), by a petition pointing out the particular grievance, and praying leave to except, and the exceptions being over-ruled, gave costs beyond the deposit on this ground.

of the Court of Exchequer ; (see directions in Exchequer, No. III. *supra*, and Duchy Court of Lancaster ;) but has been long disused in the Court of Chancery. See *Sanford v. Biddulph*, 9 Ves. 36.

In *Parkinson v. Ingram*, *supra*, the Master of the Rolls notices that he had found three decrees in the time of James II. in which the above direction was inserted, and that he had been furnished by Mr. Dickens with a decree in the reign of William III. in which the only difference was that the Master was to be at liberty to examine witnesses, and states that no other decrees were to be found. But see *Miller v. Stephens*, Appendix (4).

The same subpoena issues to compel the attendance of witnesses before the Master as before the examiner, (which is the same as the subpoena to answer), but the label explains the purpose where the examination is in town, and the body of the subpoena where it is in the country. *Parkinson v. Ingram*, *supra*.

If the Master sees cause to direct a commission to the country, he does not direct it, but certifies that it is necessary. S. C. For Certificate, see *Hand's Pract.* 262. 2 *Turn. Pract.* 77.

An exception does not lie to this certificate, but a motion may be made to discharge the order for a commission. *Chaffen v. Wills*. 1 *Dick.* 377.

Upon the certificate of the Master that a commission is necessary, it issues of course. *Sanford v. Biddulph*, *supra*.

For orders for a commission to examine witnesses before the Master. See *Hand's Pract.* 135, 136.

But without the Master's certificate the order for a commission is irregular. *Bearcroft v. Berkley*, 2 *Cox*, 108,

For a commission to examine witnesses under a decree in the Exchequer. See 2 *Fowl.* 285.

The depositions taken under a commission are to be filed in the Six Clerks' Office. *Parkinson v. Ingram*, *supra*.

Those taken before the Master are to be kept in his office, S. C.

So the examinations of parties taken under a commission are to be filed in the Six Clerks' Office. *Dyott v. Anderton*, 3 *V. & B.* 177. note.

Interrogatories.

Where witnesses are examined before the Master, the interrogatories are not settled by him. *Willan v. Willan*, *Cooper*, 293. But see S. C. 19 *Ves.* 593.

So where the Master certifies that a commission is necessary, the interrogatories are not settled by him. Anon. *Ex relatione*, Mr. Tinney.

Publication.

In *Shepherd v. Collyer*, cited 3 Ves. 608. *semble*, S. C. cited 19 Ves. 594. it was stated, that in depositions before the Master publication did not pass. But in *Willan v. Willan*, 19 Ves. 591. note. S. C. Cooper, 291. this was denied at the bar. And in that case it was held, that whether publication took place in form or not, after an examination under the decree was concluded and made known, further examination would not be permitted, except under special circumstances. And see *Shepherd v. Collyer*, *supra*. And in *Handley v. Billinge*, 1 Sim. 511. it was certified by three clerks in court, that where witnesses are examined after a decree, before the examiner or under a commission, an order must be obtained for passing publication, unless it is passed by the consent of the clerks in court; but that where witnesses are examined by the Master, publication passes by his warrant; and the Vice-Chancellor made an order accordingly.

Re-examination of Witnesses before the Master.

A witness who has been examined in the cause cannot be re-examined by the Master without the leave of the Court. *Cowslade v. Cornish*, 2 Ves. 270. S. C. 1 Dick, 149. *Browning v. Barton*, 2 Dick, 508. *Sawyer v. Bowyer*, 2 Dick, 639. S. C. 1 Bro. 388. *Vaughan v. Lloyd*, 1 Cox, 312. *Smith v. Althus*, 11 Ves. 564. *Willan v. Willan*, 19 Ves. 592. Though he was interested at the hearing, and therefore incompetent. *Sandford v. Paul*, 2 Dick, 750. S. C. 3 Bro. 370. 1 Ves. jun. 398. But see *Callow v. Mince*, 2 Vern, 472. In *Medley v. Pearce*, 1 West. 128. it was said by Lord Hardwicke, that, according to the strict rule, an order was necessary for the examination of a witness to matters of account before the Master, who had been examined to other facts before the hearing, but that the practice was otherwise. And in *Swinford v. Horne*, 5 Mad. 379. it was held, that the Master might, without an order, examine to different matters a witness who had been examined before a decree, but not to the same matters. And in *Greenaway v. Adams*, 13 Ves. 360. witnesses having been re-examined before the Master upon different interrogatories without an order, an order was made, not being

opposed, to receive their depositions. But in *Smith v. Graham*, 2 Swan. 265. the deposition of a witness, who had been previously examined, though to different matters, was suppressed ; but leave was given to re-examine him. A witness who has been examined to prove exhibits before the hearing, may be re-examined before the Master, to prove other exhibits without an order, *Courtenay v. Hoskins*, 2 Russ. 253. In *Browning v. Barton*, *supra*, the order directed that the witnesses were not to be examined to any matter they had been before examined to. But it seems that this direction is improper. See *Vaughan v. Lloyd*, *supra*. The Court, however, directs the interrogatories to be settled by the Master, who, in so doing, will take care that the same witness is not a second time examined to the same facts. *Vaughan v. Lloyd*, *supra*. and see *Smith v. Graham*, *supra*. *Sandford v. Paul*, *supra*. Unless he has been merely examined to prove exhibits. *Birch v. Walker*, 2 Sch. and Lefr. 518. and see *Vaughan v. Lloyd*, *supra*.

Examination of Parties as Witnesses.

Previously to the decree, a plaintiff may examine a defendant as a witness, saving just exceptions. *Gilb. For. Rom.* 139. *Man v. Ward*, 2 Atk. 229. And see *Barrett v. Gore*, 3 Atk. 401.

So a defendant may examine a co-defendant, saving just exceptions. *Gilb. For. Rom. supra*. And see *Piddock v. Brown*, 3 P. W. 288.

The order usually proceeds upon a suggestion that the party has no interest. *Gilb. For. Rom. supra*. And see *Murray v. Shadwell*, 2 V. & B. 401.

In *Anon.* 18 Ves. 517, the Lord Chancellor seemed to think that if the suggestion was not founded in fact, the objection might be taken before the hearing.

But in *Lee v. Atkinson*, 2 Cox, 413. it was held that the suggestion was not essential to obtaining the order ; and that the objection could not be taken before the hearing. And see *Murray v. Shadwell*, *supra*. *Gilb. For. Rom. supra*.

The order is not of course after replication. *Winter v. Kent*, 2 Dick. 595.

Nor *à fortiori* after a decree, but leave may be obtained. *Franklyn v. Colquhoun*, 16 Ves. 218. *Purcell v. M'Namara*, 17 Ves. 434. *Hougham v. Sandys*, 2 S. & S. 221.

The plaintiff, notwithstanding his having examined a defendant as

a witness, may obtain a decree against him as to other matters. *Nightingale v. Dodd*, Ambl. 583.

A plaintiff cannot examine a co-plaintiff as a witness. *Phillips v. Duke of Buckingham*, 1 Vern. 230. *Mayor of Colchester v. ———*, 1 P. W. 595. And see *Hewatson v. Tookey*, 2 Dick, 799. *Benson v. Chester*, Jac. 577.

But an order may be obtained for striking out his name as a co-plaintiff, and making him a defendant, for the purpose of examining him as a witness, upon giving security for costs. *Motteux v. Mackreth*, 1 Ves. jun. 142. *Lloyd v. Makeam*, 6 Ves. 145. *Witts v. Campbell*, 12 Ves. 493.

And the order may be obtained after replication. *Motteux v. Mackreth*, *supra*.

But not after a decretal order. *Benson v. Chester*, *supra*.

Liberty has been given to a defendant to examine a plaintiff as a witness. *Armiter v. Swanton*, Ambl. 393. *Troughton v. Getley*, 1 Dick. 382.

But the latter case has been reprobated. See *Hewatson v. Tookey*, *supra*.

Nevertheless leave may be obtained, if the plaintiff consents. *Walker v. Wingfield*, 15 Ves. 178.

Leave may be obtained by a defendant for the examination of a *prochein ami*. *Bird v. Owen*, Mos. 312.

Examination vivâ voce.

By Lord Lyndhurst's orders, 69. 2 Russ. (Appendix) 23. It is ordered, that the Master have power, at his discretion, to examine any witness *vivâ voce*, and that in such case the subpoena for the attendance of such witness, shall, upon a note from the Master, be issued from the subpoena office; and that the evidence upon such *vivâ voce* examination shall be taken down by the Master, or by the Master's clerk in his presence, and preserved in the Master's office, in order that the same may be used by the Court if necessary.

By Lord Lyndhurst's orders, 72. 2 Russ. (Appendix) 24. It is ordered, that the Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require, the evidence upon such examination being taken down at the time by the Master, or by the Master's

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clerk, in his presence, and preserved, in order that the same may be used by the Court, if necessary.

Affidavits.

Upon a reference to the Master under a decree, affidavits can only be received by the Master by consent. See *Willan v. Willan*, 19 Ves. 593. But if the Master receives affidavits, and they are not objected to on the other side, the report cannot be objected to on the ground that the witnesses ought to have been examined upon interrogatories. *Morgan v. Lewis*, 1 Newl. Pract. 333. note. And see Mr. Bell's Evidence, Chancery Report, Appendix A. p. 241.

In a reference on a question of legitimacy, the Master was directed not to proceed upon affidavits (which had been obtained from America) with liberty, under the circumstances, to apply to the Court, if by death or otherwise it became impossible to obtain, under a commission, the evidence of the persons who had made the affidavits. *Tillotson v. Hargrave*, 3 Mad. 494.

In a reference upon a motion in a cause, affidavits were received by the Master, upon the principle, that where the reference is made in a stage of the cause in which the Court proceeds upon affidavit, the Master may do the same. *Sonnet v. Powell*, *Ex relatione Mr. Tinney*.

Where the matters referred to the Master originate in motion or petition, the Master proceeds by affidavit, 1 Newl. Pract. 333.

As on a reference under the statute 52 Geo.3. c. 101. *Ex parte Greenhouse*, 1 Swan. 60.

So in Bankruptcy and Lunacy. *Ib.*

Upon a reference to the Master in Bankruptcy, affidavits which might have been read on the hearing of the petition, may be read before the Master. *Ex parte Jackson*, 1 Rose, 45.

By Lord Lyndhurst's orders, 65. 2 Russ. (Appendix) 23. It is ordered, that all affidavits which have been previously made and read in court, upon any proceeding in a cause or matter, may be used before the Master.

By Lord Lyndhurst's orders, 66. *Ib.* It is ordered, that where, upon an inquiry before the Master, affidavits are received, there no affidavits in reply shall be read, except as to new matter which may be stated in the affidavits in answer; nor shall any further affidavits be read, unless specially required by the Master.

APPENDIX (1).

Order for Inquiry as to the Effect of Law in Scotland.

This court doth order that it be referred to Mr. S., one of the Masters of this court, to enquire and state to the court whether the proceedings of the defendant in Scotland will, by the law of Scotland, be followed by any consequences which are in contravention of the trust deed in the pleadings mentioned, with liberty to the said Master to state any special circumstances relating thereto as he shall think fit; and in the mean time it is ordered that the injunction granted in this cause be continued. And after the said Master shall have made his report, such further order shall be made as shall be just. *Campbell v. Houlditch*, V. C. 19th December, 1820. Reg. Lib. A. 1820, fol. 594.

APPENDIX (2).

Direction for Production limited.

And for the better taking of the accounts before directed, the parties are to be examined upon interrogatories, and produce before the said Master upon oath all books, papers and writings in their custody or power relating thereto, as the said Master shall direct, who in taking the said accounts is to make unto the parties all just allowances. *Hargrave v. Richardson*, 9th July, 1753. Reg. Lib. A. 1752, fol. 566.

So in *Plunket v. Penson*, L. C. 3d April, 1742. Reg. Lib. B. 1741, fol. 228. *Howarth v. Powell*, L. C. 4th July, 1743. Reg. Lib. A. 1742, fol. 660. *Ellison v. Airey*, L. C. 13th July, 1748. Reg. Lib. A. 1747, fol. 699.

APPENDIX (3).

Order for leave to inspect Books of Bank, &c.

Upon consideration this day had by the Right Honourable the Master of the Rolls, of the humble petition of the defendant Scott, setting forth, that the plaintiff, having filed her bill in this court against the petitioner, in relation to several parcels of South Sea Annuities, and South Sea Stock and Bank Stock, which formerly belonged to Sir N. W. and D. W. deceased, the father and sister of the plaintiff, the petitioner is advised to prove that the said stocks were transferred by the said plaintiff and the said Thomas Whorwood, her said husband, during her coverture, to or to the use of the said Thomas Whorwood, whereby he became possessed thereof in his own right; It was therefore prayed, and it is accordingly ordered, that the petitioner

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Cecilia Scott and her Solicitor be at liberty to inspect the books of the South Sea Company, and of the Company of the Bank of England, so far as they relate to the matters in question in this cause, and to take copies thereof as she shall be advised, at her own expense, of which notice is to be given forthwith. *Whorwood v. Scott*, M. R. 29th June, 1748, Reg. Lib. B. 1747. fol. 378.

[The bank, &c. were not parties.]

So in *Lethieuller v. Tracy*, L. C. 9th August, 1748, Reg. Lib. B. 1747, fol. 450.

APPENDIX (4.)

Direction for a Commission to the Master for the Examination of Witnesses.

For which purpose, and the said Master's better proceeding in the said account, he is to be armed with a commission for examination of witnesses as he shall see cause. *Miller v. Stephens*, Lord Keeper, 25th April, 1670, Reg. Lib. B. 1669, fol. 507.

No. IV.

LIBERTY TO STATE SPECIAL CIRCUMSTANCES.

And the Master is to be at liberty to state any special circumstances.

NOTE.

By Lord Clarendon's orders, Beames, 208. the Masters are not to return special certificates to the Court unless they are required by the Court so to do, or that their own judgment in respect of difficulty leads them to it. And see Lord Coventry's orders, 19. Beames, 80. Lord Bacon's orders, 49. Beames, 23.

In decrees for account the Master may state special circumstances, though there is no direction for that purpose in the decree, *Anon.* 2 Atk. 620. So the Master may state his reasons for disallowing a claim. *Champernowne v. Scott*, 4 Mad. 209.

And see Decrees for Account, *post*.

In decrees for account in the Exchequer, there is a direction for liberty to the Master to state special circumstances. See Directions in Decree in the Exchequer, No. III. *ante*.

No. V.

SEPARATE REPORT.

And let the Master be at liberty to make a separate report as to any of the matters aforesaid.

NOTE.

It seems that formerly a separate report was commonly granted for asking, at the expense of the party applying. See Harr. 478. And now by Lord Lyndhurst's orders, 70. 2 Russ.(Appendix), 24. It is ordered, that in all matters referred to him the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court.

In the Exchequer a separate report is not allowed, except to expedite proceedings; nor on account of distinct matters, as they may be kept distinct by the general report. *Harc v. Bruford*, 13 Price, 277.

Proceeding de die in diem.

Where the circumstances of the case require it, the Master will be ordered to proceed *de die in diem*. See Gilb. For. Rom. 165.

For an order for this purpose, see Hand's Pract. 161.

In *Lingham v. Sturdy*, 5 Ves. 423. the Master of the Rolls observed, that the order was unnecessary; and that the Master might, and that it was his duty to proceed, without an order, where the case required it. But in *Purcell v. M'Namara*, 11 Ves. 362. the Lord Chancellor held that an order was necessary, but that it was not imperative upon the Master; and that he might avail himself of it, or not, as the case required.

In decrees in the Exchequer the Master is directed to make the report with all convenient speed. See Directions for Decree in the Exchequer, No. III. *ante*.

No. VI.

DIRECTION FOR SALE OF ESTATES.

It is ordered that the said estates, or a sufficient part thereof, be sold, with the approbation of the said Master (1), to the best purchaser or purchasers that can be got for the

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same, to be allowed of by the said Master, wherein all proper parties are to join, as the said Master shall direct. And in order to such sale, the parties are to produce (2) before the said Master upon oath, all deeds and writings in their custody or power relating to the said estates.

For orders *nisi*, and to confirm report of purchaser absolutely. See Hand's Pract. 143, 144.

For the like orders in the Exchequer. See 2 Fowl. 308, 311.

For orders for letting purchaser into possession, and delivery of title deeds. See Hand's Pract. 145, 146. 148. 151. 154.

For like order in the Exchequer. See 2 Fowl. 313.

For order for delivery of deeds, where deeds relate to the estates sold jointly with other estates said to be settled by Lord Hardwicke. See Hand's Pract. 152.

For certificate of payment of purchase money. See Hand's Pract. 272.

For certificates of delivery of title deeds. See Hand's Pract. 266. 267.

For order for opening biddings. See Hand's Pract. 141.

For certificate of payment of deposit. See Hand's Pract. 271.

For order by consent for discharging purchasers, and for a re-sale. See Hand's Pract. 153.

NOTES.

(1) For mode of sale. See 1 Turn. Pract. 213.

By Lord Lyndhurst's orders, 75. 2 Russ. (Appendix) 25. It is ordered, that in cases where estates or other property are directed to be sold before the Master, the Master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place and by such person as he shall think fit.

Leave will be given to the Master to fix a reserved bidding, *Shaw v. Simpson*, 1 J. & W. 392. note; and see *Jervoise v. Clarke*, 1 J. & W. 389.

For order for sale by auction. See *Equity Draftsman*, 630.

(2) The production should also be subject to the direction of the Master, *Gregory v. Barefoote*, (Appendix (1)). *Wride v. Clarke*, Appendix (1). And see *Production of Books, &c. ante*.

APPENDIX (1).

Direction for Production limited.

It is ordered and decreed that the said intestate's real estate, or a sufficient part thereof, be sold, &c. And in order for such sale, the parties are to produce before the said Master, upon oath, all deeds and writings in their respective custody or power relating thereto as the said Master shall direct. Gregory v. Barefoote, M. R. Nov. 23, 1747. Reg. Lib. A. 1747. fol. 101.

The like direction. Wride v. Clarke, M. R. July 1, 1766. Reg. Lib. B. 1765. fol. 464. S. C. 2 Bro. 261, note. 1 Dick. 382.

No. VII.

**DIRECTION TO SETTLE CONVEYANCE, &c.
IN CASE PARTIES DIFFER.**

And the said Master is to settle the said conveyances, in case the parties differ about the same.

NOTE.

For the mode of proceeding under this direction, see Lord Lyndhurst's orders, 76. 2 Russ. (Appendix) 25. and order for costs of settling conveyance. Hand's Pract. 208.

Exceptions lie to the Master's certificate of having settled a conveyance, Lloyd v. Griffith, 3 Atk. 264.

And in order that the party may except, the Master will be ordered to certify. Lloyd v. Griffith, 1 Dick. 103. Huggins v. York Buildings Company, there cited.

No. VIII.

**DIRECTION FOR PAYMENT OR TRANSFER
BY PARTY.**

It is ordered, that the said defendant do pay unto the plaintiff the sum of £——.

NOTE.

The direction by the decree for doing any particular act is usually general in the first instance, without specifying any particular time for compliance.

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Otherwise in the case of an interlocutory order. See Direction for Payment into Court, No. X. *post*.

Sometimes it is referred to the Master by the decree, to fix a time and place for compliance. See Gilb. For. Rom. 170. *Lowther v. Andover*, 1 Bro. 396. And see Decrees respecting Mortgages, *post*; Decrees respecting Partners, *post*; and Decree for securing Annuity Real Assets, *post*.

Sometimes it is referred to the Master by a subsequent order. See *Urmston v. Singleton*, Appendix (1).

But of late a time for compliance is usually fixed by a subsequent order, called the "Short Order."

See Short Order, *post*.

APPENDIX (1).

Order for Reference to Master to fix Time, &c.

Upon opening of the matter this present day unto the Right Honourable, &c. by Mr. B. of counsel with the plaintiffs, It was alleged that, &c. that upon the hearing of this cause, the 24th of July, 1747, it was (among other things) decreed that the said agreement should be carried into execution, and that it should be referred to Mr. E. one, &c. to inquire whether a good title could be made by the plaintiffs, &c. That the said master by his report, dated the 4th of March, 1747, certified that a good title could be made by the plaintiffs, &c. That by a subsequent report of the 14th of June last the Master certified that he had computed interest, &c. and that he had settled the conveyances. That the plaintiffs, finding that the defendant is not able to pay the said money, are unwilling to execute the deeds, and thereby convey the estate to him; and in regard no time or place is fixed by the decree for payment of the said purchase money: It was, therefore, prayed that, &c. Whereupon, and upon hearing of Mr. A. of counsel with the defendant, and what was alleged, &c. his Lordship doth order that it be referred to the said Master to appoint a time and place for the execution of the purchase deeds, and payment of the purchase money. And it is further ordered, that the plaintiffs do execute the purchase deeds at the same time and place; and at the same time, on execution of those deeds, the defendant is to pay the plaintiffs the purchase money. *Urmston v. Singleton*, L. C. 23d July, 1748. Reg. Lib. B. 1747, fol. 404.

No. IX.

SHORT ORDER.

Upon motion this day made unto this Court by Mr. N. of counsel for the plaintiff, it was alleged, that by a decree made in this cause, bearing date, &c. It was ordered, that the defendant should pay unto the plaintiff the sum of £—— together with interest thereon after the rate of, &c., and that it should be referred to Mr. C. one &c., to compute such interest, in case the parties differed about the same. And it was ordered, that the said defendant should pay unto the plaintiff her costs of this suit, to be taxed by the said Master, in case the parties differed; and any of the parties were to be at liberty to apply &c. That the said Master, by his report, dated, &c. certified &c. That it appears, by the affidavit of E. A., that, by virtue of a power of attorney, &c. he did, on, &c. personally demand, &c. And therefore it was prayed that the said defendant, Richard Crump may, within one month from the date hereof, pay to the said plaintiff the sum of £—— by the said Master's report made in this cause, dated &c. certified to be due from the defendant to the plaintiff, for principal and interest on the legacy in the pleadings in this cause mentioned, which, upon hearing the said decree, dated &c., and the said Master's report, dated &c. and an affidavit of notice of this motion to the plaintiff read, is ordered accordingly. *Collins v. Crump*, V.C. 19th June, 1818. Reg. Lib. A. 1817, fol. 1301. S. C. 3 Mad. 390.

For like orders. See Hand's Pract. 180. 182.

No. X.

**DIRECTION FOR PAYMENT OR TRANSFER
INTO COURT. (1)**

It is ordered that the said defendant do pay (2) the sum of £—— (3) into the Bank with the privity of the Accountant-General (4) of this Court, to the credit of this cause (5), subject to the further order of the Court.

Ordering Part.

NOTES.

(1) For mode of payment or transfer into court. See 1 Newl. Pract. 16, 17.

For mode of depositing specific articles in the Bank, in the name of the Accountant General. See 1 Newl. Pract. 17.

(2) In interlocutory orders for payment or transfer into court, a time should be specified. See *Higgins v. ———*, 8 Ves. 382.

If the order is not complied with within the time specified, a new order must be obtained.

It has been proposed to obviate this inconvenience by making the order general. See Proposition 121, subjoined to the Chancery Report.

Where, by the decree, a party is directed to pay a balance into court, retaining his costs; in case of non-compliance, he will be ordered within a limited time to bring in his bill of costs to be taxed. *Newsome v. Shearman*, 2 S. & S. 95.

(3) Where the order directs the payment of a specific sum, the Accountant General will not receive a less sum without a further order. *Payne v. Collier*, 1 Ves. jun. 171.

(4) *Accountant General.*

Formerly, the effects of the suitors were entrusted to the Masters and Usher of the Court; but this having been attended with abuses, orders were made directing that they should be placed in the Bank of England, to the account of the Masters and Usher, but not to be subject to their disposition, except in the manner prescribed by the orders. See Orders of 26th May and 4th of November 1725, recited in the stat. 12 Geo. 1. c. 32. Beames, 340.

By the stat. 12. Geo. 1. c. 32. s. 2. an officer (called the Accountant-General of the court of Chancery) is created for the purpose of doing all such acts relating to the delivery of the suitors' money and effects into the bank, and taking them out of the bank, and keeping accounts with the bank, and all other matters relating thereto, as are directed by the above orders to be done by the Master and Usher.

Since the passing of this act, all sums ordered to be paid into court, are directed to be paid into the bank, in the name and with the privity of the Accountant-General, and placed to the credit of the cause. See Harr. 524.

By stat. 54 Geo. 3. c. 14. property vested in the Accountant-General, his heirs, executors, administrators, or assigns, in respect of his office, upon his death, removal, or resignation, is vested in his successor, subject to the same trusts.

Where an act of parliament directs money to be paid into the bank in the name, and with the privity of the Accountant-General, he is bound to receive it without an order. Anon. 1 Ves. jun. 56.

(5) Sometimes the direction is for payment to a particular account, or to distinct accounts; and orders may be obtained for a transfer from one account to another.

For mode of carrying over money or stock from one account to another. See 1 Newl. Pract. 21.

No. XI.

DIRECTION FOR INVESTMENT. (1)

And it is ordered that the said sum of £——when so paid into the Bank be laid out (2) in the purchase of (3) £3 per cent. Bank annuities, in the name and with the privity of the said Accountant-General, in trust in this cause; and the said Accountant-General is to declare the trust (4) thereof accordingly, subject to the further order of this Court. And for the purposes aforesaid, the said Accountant-General is to draw (5) upon the Bank according to the form prescribed by the Act of Parliament and the general rules and orders of this Court, in that case made and provided.

For order of investment. See Hand's Pract. 228.

NOTES.

(1) For mode of investment. See 1 Newl. Pract. 18.

(2) *Investment.*

Money directed to be paid into court, will be invested on the application of any of the parties to the suit. See Harr. 524. The application should be made on the Accountant-General's certificate, that the money has been paid into court, and is in court. Anon. 1 Atk. 519. S. C. 1 West 580. For form of certificate. See Hand's Pract. 273.

The direction for investment may be made part of the original order.

Ordering Part.

Notwithstanding the direction of the order, the investment will not be made until a request has been made to the Accountant-General by the solicitor for that purpose. See 1 Turn. Pract. 245.

For form of request, see Hand's Pract. 278.

It has been proposed to do away with this practice. See Proposition 122, subjoined to the Chancery Report.

(3) Stock.

Formerly the effects of the suitors were invested in mortgages, South Sea stock, &c. But now the fund adopted by the Court for investment, is the 3 per cent consols. (created by stat. 25 Geo. 2. c. 27.) See Peat v. Carne, 2 Dick. 499. note.

Where the interest of a residue was directed by will to be paid at Lady-day and Michaelmas, the investment was ordered to be made in the 3 per cents reduced. Caldecott v. Caldecott, 4 Mad. 189.

Where the interest of a residue was directed to be paid to a tenant for life quarterly, although the dividends are only paid half-yearly, the Court will direct that the interest shall vest quarterly Forsyth v. Sivewright, Appendix (1).

(4) Declaration of Trust.

By stat. 12 Geo. 1. c. 32. s. 5. All securities taken by the direction of the court, for the benefit of suitors, are to be taken in the name of the Accountant-General, and the particular trust is to be specified in the security. And see order of 4th November, 1725, there recited. Beames, 344.

(5) Mode of Drawing.

The draft is to be limited to be paid within a month after date, and if not paid within that time, it is to be void. See order of the 4th November 1725, stat. 12. Geo. 1. c. 32. Beames, 340.

For form of draft, see Hand's Pract. 274, 275. 277.

APPENDIX (I).*Directions that Payments shall vest Quarterly*

Declare that although the payment of interest of the said sums of £——, &c., and of the said Bank annuities so to be purchased can only be made half-yearly, yet that the said defendant E. P. is entitled under the said testator's will to receive the interest and produce of the residue of his personal estate quarterly; and that therefore the quarterly payments of the interest and produce of the said

residue, as the same shall become due to her by virtue of such will, be vested in equity upon the several quarter days mentioned in the said testator's will. *Forsyth v. Sivewright*, from a MS. of Mr. Newland. Same decree. 2 Newl. Pract. 322.

No. XII.

DIRECTION FOR ACCUMULATION.

It is ordered, that the interest and dividends to accrue due on such Bank annuities when so purchased, and all accumulations thereof be from time to time (1) laid out in the purchase of the like 3 per cent. annuities in the name and with the privity of the said Accountant-General, in trust in this cause, and he is to declare the trust thereof accordingly, subject to the further order of this court. And for the purposes aforesaid the said Accountant-General is to draw, &c. [See No. XI. *ante.*]

For like order, see Hand's Pract. 229.

NOTE.

(1) Sometimes dividends are directed to be laid out as the same shall amount to a competent sum.

But this is of late disused.

Under such a direction the Accountant-General will not lay out less than 100*l.*

No. XIII.

DIRECTION FOR PAYMENT OUT OF COURT. (1)

It is ordered, that the sum of £ ——— standing in the name of the Accountant-General of this Court to the credit of this cause be paid to the plaintiff (2), and for the purposes aforesaid, the said Accountant-General is to draw, &c. [See No. XI. *ante.*]

For Accountant-General's certificates of amount of funds in Court. See Hand's Pract. 270.

NOTES.

(1) For the mode of payment out of Court. See 1 Turn. Pract. 240. 1 Newl. Pract. 18. Decrees respecting Personal Assets, *post.*

For the mode of payment out of Court, where it is to be accompanied with a particular act, as the execution of deeds. See 1 Turn. Pract. 241.

For the mode of payment of costs out of fund in Court. See 1 Turn. Pract. 239.

(2) The only two cases in which the Accountant-General ever tries a fact, are first, where under an order to pay interest to a single woman, he goes on to pay, upon receiving proof of her marriage. The other, where he receives the probate as proof of the death of a party, and upon that pays the representative. *Clayton v. Gresham*. 10 Ves. 288.

But this practice differs from that of the Court. See *S. C. and Hough v. Ryley*, 2 Cox, 157.; and in the former case, which was an application by the petitioner, upon her marriage, for the payment of the interest of a fund in Court which had been previously ordered to be paid to her separate use, the Lord Chancellor, in addition to an affidavit of the marriage, required an affidavit that the interest of the fund was not affected by any settlement or articles. See Decrees respecting *Fèmes Covert*, *post*.

By the order of the 16th February, 1816. Beames, 464. 5 Ves. 742, note. 8 Ves. 201. note; where any sum is directed to be paid, or is reported due to an unmarried woman, in case of her marriage before payment, where the sum does not amount to 200*l.* or 10*l.* a year, upon affidavit of the husband and wife, stating the marriage, and that no settlement, or agreement for a settlement has been made affecting such sum, the Accountant-General may make his draft for such sum payable to the wife or the husband.

Formerly the Accountant-General would pay sums under 30*l.* to the personal representative of the party entitled under a provincial administration. See *Docker v. Horner*, 2 Dick. 746. S. C. 3 Bro. 240.

And orders have been obtained for payment of sums beyond that amount under such administrations. *Street v. Partridge*, 5 Ves. 148. *Upton v. Lord Ferrers*, cited 6 Ves. 118.

But it is now settled, that however small the sum, a prerogative probate is necessary. *Thomas v. Davies*, 12 Ves. 417. *Newman v. Hodgson*, 7 Ves. 409. *Challnor v. Murhall*, 6 Ves. 118. *Docker v. Horner*, *supra*.

In *Newman v. Hodgson*, *supra*, it was intimated by the Lord Chancellor that a bill ought to be brought into Parliament on this subject.

The Accountant-General was directed to pay a legacy to the surviving executors of the legatee, without requiring the concurrence of the executor of a deceased executor. *Moodie v. Bainbridge*, 6 Mad. 107.

An order may be obtained for payment to the attorney of the party. *Hill v. Chapman*, 11 Ves. 239. But not to his solicitor. See *Direction for Payment of Costs*, *post*.

But whether such an order is necessary, *qu.* as the money may be received under a power of attorney from the party entitled, without an order.

Payment of a legacy has been ordered to a person having a general power of attorney only from the legatee. *Carr v. Estabrook*, 2 Cox, 390. *Yerbury v. Head*, there cited.

For the mode in which powers of attorney executed abroad for the receipt of money in Court are required to be verified. See *Hutcheon v. Mannington*, 6 Ves. 823. *Lord Kinnauld v. Lady Saltoun*, 1 Mad. 227. *Garvey v. Hibbert*, 1 J. & W. 180.

No. XIV.

DIRECTION FOR SALE OF STOCK.

It is ordered that the sum of £——, Bank 3 per cent. annuities, standing in the name of the Accountant-General of this Court in trust in this cause, be sold with the privity of the said Accountant-General, and one of the cashiers of the Bank is to have notice to attend and receive the money to arise by such sale, who upon receipt thereof is to pay the same into the Bank, with the privity of the said Accountant-General, to be there placed to the credit of this cause.

For order for sale of stock and payment of cash out of court. See *Equity Draftsman*, 617.

For Accountant-General's certificate of having sold stock. See *Hand's Pract.* 282.

NOTE.

For mode of sale or transfer of stock by Accountant-General, or delivery out of specific articles. See 1 Newl. Pract. 19.

For mode of paying off or exchanging Exchequer bills. See 1 Newl. Pract. 21.

No. XV.

FURTHER DIRECTIONS.

And his Lordship doth reserve the consideration of all further directions, until after the said Master shall have made his report.

NOTE.

In interlocutory decrees further directions are usually reserved. See Interlocutory Decrees, *ante*.

And this reservation will be continued from time to time, if necessary. *Lowthian v. Hasell*, M. R. 19th March, 1787. Reg. Lib. B. 1786. fol. 349. S. C. L. C. 23d July, 1789. Reg. Lib. B. 1788. fol. 582.

After this reservation the Court will not interfere upon the matter reserved in a summary way; but the cause must be set down for hearing. *Cooke v. Gwyn*, 3 Atk. 689. And see *Lord Shipbrook v. Lord Hinchinbrook*, 13 Ves. 394.

For orders for setting down the cause for further directions, &c. See Hand's Pract. 173. &c. But an order in the nature of further directions may be made upon motion by consent. *Anon.* 11 Ves. 169. And after a decretal order for reference of title made upon motion, further directions may be obtained on motion also. *Brooke v. Clarke*, 1 Swan. 551. And see *Walters v. Pyman*, 19 Ves. 351. *Shore v. Collett*, Coop. 238. *Whitcomb v. Foley*, 6 Mad. 3.

So after a decretal order made on motion for an account of incumbrances, and to ascertain priorities, an order for further directions and costs has been made on petition. *White v. Bishop of Peterborough*, M. R. 20th December, 1821. MS.

Where an issue and a reference were directed by the decree, and further directions were reserved till after the trial and report, and in consequence of the verdict the reference became unnecessary, a petition for leave to set down the cause for further directions, or such other order as the Court should think fit, was dismissed. *Dixon v. Olmius*, 1 Ves. jun. 153. The proper course would have been to rectify the decree.

Where the decree directs a reference to the Master generally, with liberty to the Master to make a separate report, as to any special

matter, further directions should be reserved till after the general report. *Van Kamp v. Bell*, 3 Mad. 430.

Any order upon the separate report must be made on petition S. C.

But that a direction for a separate report is not now necessary. See No. V. *ante*.

A cause need not be set down for further directions, or upon the equity reserved before the same judge who heard it originally. See *Pemberton v. Pemberton*, 11 Ves. 53.

But as to the inconvenience of the practice. See S. C.

The following proposition upon this subject is among those subjoined to the Chancery Report.

Proposition 120. That all causes originally heard by the Master of the Rolls or the Vice-Chancellor shall be heard, on further directions by the same judge, unless the party entitled to set down such cause for hearing on further directions shall think fit to have such cause heard by the Lord Chancellor.

Upon further directions the Court may add to the decree. *Creuze v. Hunter*, 2 Ves. jun. 164. And see *Dormer v. Fortescue*. 2 Atk, 284. *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 394. And see *Reservation of Interest*, *post*.

But the decree cannot be altered. *Taylor v. Popham*, 15 Ves. 76. And see *Walker v. Symonds*, 3 Swan. 60. and mode of rectifying Decrees, *post*.

Except in the case of a charity. *Attorney General v. Whiteley*, 11 Ves. 241.

Sometimes, however, an error in the original decree is got rid of on further directions, by allowing a short petition of rehearing to be presented. *Bailey v. Ekins*, 7 Ves. 324.

So upon exceptions to the report, no order can be made which is inconsistent with the original decree. *Brown v. De Tastet*, Jac. 293. *East India Company v. Keighley*, 4 Mad. 16.

Formerly original decrees, in many cases, contained such full directions as almost to render any application to the Court for further directions unnecessary; but this is not the case in modern decrees. See the evidence of the Lord Chief Baron, Chancery Report, Appendix A. p. 346.

And see *Decrees for Account*, *post*.

Decrees respecting Real Assets, *post*.

Decrees for Partition, &c. post.

Decrees respecting Partners, post.

Decrees respecting Sureties, post.

For further matters relating to further Directions. See Decrees under each particular head.

No. XVI.

RESERVATION OF INTEREST.

And the Court doth reserve the consideration of &c. and of interest, until after the said Master shall have made his report.

NOTE.

In *Macarte v. Gibson*, 14 Vin. 458. pl. 13. Lord King at first thought that interest might be given by the Master under the head of just allowances; but upon being informed by the Master that he never allowed interest, unless a particular order was made for that purpose, he reserved the consideration of interest and costs till after the Master's report. In *Ryves v. Coleman*, 2 Atk. 440. it was said by Lord Hardwicke, that, generally, no interest could be allowed, where it was not ordered or reserved by the decree; but that notwithstanding there was no particular reservation of interest by a decree, yet that there was a discretionary power in the Court to allow interest upon special circumstances. And in *Champ v. Mood*, 2 Ves. 474. he observed, that the reservation of further directions in general had not been taken to reserve interest, and that interest ought to be expressly directed by the decree to be reserved; but he admitted that there might be a case, where, it having been pointed out in the cause, the Court would take interest to be reserved on such general directions; that after a direction of a trial at law, reservation of general directions would be taken to include costs, interest, and every thing; but in the common case of a reference to a Master it was taken to be otherwise. And in *Hearle v. Greenbank*, 1 Dick. 370. interest not having been reserved by the decree, Lord Northington said he could not order it on further directions; but recommended the plaintiff to rehear the cause, merely to introduce a reservation of interest. In a previous case, however, *Goodyere v. Lake*, Ambl. 584. S.C. 1 West, 490. Lord Hardwicke had, according to the report in Ambler, held it to be clear that, under the gene-

ral reservation of further directions, the Court might give interest, though not reserved by the decree, and referred to the case of the *Hudson's Bay Company v. Sir Stephen Evans*, in which it was done. And in *Sammes v. Rickman*, 2 Ves. jun. 36. And *Margerum v. Sandiford*, there cited, it was so held accordingly. And in *Creuze v. Hunter*, 4 Bro. 318. S. C. 2 Ves. jun. 164. Lord Roslyn said, he had thought that if interest was not given by the decree, or reserved, it was matter of rehearing; and that, in strictness, this was the rule; but that if the point was made upon the hearing for further directions, he saw no objection to its being then given if the case would warrant it; and he expressed himself satisfied with the authority of *Margerum v. Sandiford*, that it might be so.

But though interest may be given on further directions, though not reserved by the decree, it will not be given on petition. *Creuze v. Hunter*, *supra*. And see Decrees respecting Executors and Trustees, *post*.

That interest will be given, though not prayed by the bill. See *Bruere v. Pemberton*, 12 Ves. 389. *Turner v. Turner*, 1 J. & W. 43. *Pearse v. Green*, 1 J. & W. 135. *Good v. Blewitt*, there cited.

No. XVII.

RESERVATION OF COSTS.

And his Lordship doth reserve the consideration of, &c. and of the costs of this suit, until after the said Master shall have made his report.

NOTE.

Formerly a direction was inserted in decrees, with a view to charge the defendant with costs, in case he should give unnecessary trouble in carrying the decree into execution. See *Scarborough v. Burton*, 2 Atk. 111. *Benson v. Dean and Chapter of York*, Belt's Supplement, 67. *Pearson v. Robinson*, L. C., 28th of June, 1748. Reg. Lib. B. 1747, fol. 506. But Lord Hardwicke did not approve of clauses of this kind, and intimated that the question of costs should either be determined or reserved. S. C. Barn. Ch. Ca. 255. In that case, however, such a direction having been inserted in the decree (which was by the Master of the Rolls), he made an order accordingly. S. C. And see Beames on Costs, 172.

In cases where the defendant may be liable to costs, it is usual to reserve the consideration of costs, even though there might be ground enough for giving them at the hearing, with a view to accelerate the cause. *Scarborough v. Burton, supra*. And see *Sanderson v. Walker*, 13 Ves. 601.

Where costs are given by the decree generally, costs subsequent to the decree are included. *Quarrell v. Beckford*, 1 Mad. 286. and see *Clutton v. Pardon*, Turn. 304. and this, notwithstanding a reservation of subsequent costs, "not provided for by decree," there being other costs by which these words might be satisfied. *Quarrell v. Beckford, supra*. Where subsequent costs are not intended to be given, the direction should be confined to costs up to the decree, and the question as to subsequent costs should be reserved. S.C. See *Taxation of Costs, post*.

No. XVIII.

DIRECTION FOR TAXATION AND PAYMENT OF COSTS, &c.

Let the Master tax (1) all parties their costs of this suit. And it is ordered, that such costs, when taxed, be paid as follows: viz. the plaintiffs' costs to Mr. ———, their solicitor, (2) &c.

NOTES.

(1) In *Taylor v. Popham*, 15 Ves. 76. it was held by the Lord Chancellor, that a decree for the taxation of costs, was not a judgment for payment.

But in *Quarrell v. Beckford*, 1 Mad. 286. it was held by the Master of the Rolls, that the decree for taxation was conclusive as to the right. Otherwise if the question of payment is specially reserved.

A decree for the taxation of the costs of the suit, unless expressly limited to the time of the decree, includes costs subsequent to the decree. See *Reservation of Costs, ante*.

(2) Where costs are decreed to parties, they are usually directed to be paid to their solicitors.

But the lien of the solicitor is not lost by the costs being directed to be paid to the party. *Ex parte Rhodes*, 15 Ves. 542. And see *Ex parte Bryant*, 1 Mad. 49.

For the lien of the solicitor on the fund. See *Beames on Costs*, 311. *Tidd's Pract.* 101.

Generally a fund in court belonging to a party, will not be ordered to be paid to his solicitor. *Edwards v. Lane*, 6 Mad. 315.

But sums under 10*l.* payable to a number of persons, were ordered to be paid to their solicitor, together with any further sums which might become payable to them, not exceeding that amount. *Brandling v. Humble*, Jac. 48.

No. XIX.

LIBERTY TO APPLY.

And any of the parties are to be at liberty to apply to the Court as occasion shall require.

NOTE.

The parties may apply by motion or petition.

There are no precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the Court to grant or refuse them, according to circumstances. But generally speaking, motions, which have for their object to give effect to decrees and orders, should be confined to cases where the order which is to be made upon the motion arises out of recent proceedings, concerning which there is no doubt. *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 393.

Where money is to be paid out of court, the application should be by petition. See *Anon.* 4 Mad. 228.

Unless the title is clear as where it has been carried over to the account of the party. *Heathcote v. Edwards*, Jac. 504. And the rule only applies to payment of a gross sum, not to interest on it. *Anon.* 4 Mad. 228.

The like rule is adopted in the Exchequer. See Notice 28th April, 1817. 4 Price, 22.

DECREES FOR ACCOUNT GENERALLY.

No. I.

DECREE FOR ACCOUNT.

His Honor doth order and decree, that it be referred to Mr. E., one of the Masters of this Court, to take a mutual account of all dealings and transactions (1) between the plaintiff and the defendant, for the better clearing of which account, the parties are to produce &c. [See Usual Directions, No. II. *ante*,] as the said Master shall direct, who, in taking of the said account, is to make unto the parties all just allowances (2), and what, upon the balance of the said account, shall appear to be due from either party to the other (3) is to be paid as the said Master shall direct (4). And it is further ordered, that the injunction formerly granted in this cause, for stay of the defendant's proceedings at law, be in the mean time continued (5), and the defendant's judgment is to stand a security for payment of what, if anything, shall appear to be coming to him on the balance of the said account; and his Honor doth reserve the consideration of the costs (6) of this suit, and of all further directions, until after the said Master shall have made his report, when either side is to be at liberty to apply, &c. [See Usual Directions, No. XIX. *ante*.] Old v. Old, M. R. 11th July, 1748. Reg. Lib. B. 1747, fol. 459.

NOTES.

(1) *Future Words*.

Decrees for account do not contain future words; nevertheless the defendant must account for sums received by him, subsequently to the decree. See *Bulstrode v. Bradley*, 3 Atk. 582.

And the account may be carried on as long as the suit is depending between the parties. See *Bell v. Read*, 3 Atk. 592.

And see Decrees respecting Tithes, *post*.

(2) *Allowances.*

A widow, in accounting for rents and profits received by her as trustee for her son, is entitled, under the head of just allowances, to an allowance for the arrears of her dower, and for future payments, without putting her to sue for dower. *Graham v. Graham*, 1 Ves. 262.

Where, on a bill by residuary legatees, the decree directed that the personal estate should be applied in payment of the debts and funeral expenses, in a course of administration, and the surplus to be paid to the plaintiffs, but gave no direction as to the legacies, payments in discharge of legacies were allowed as just allowances. *Nightingale v. Lawson*, 1 Cox. 23.

Under this direction, a trustee will be allowed his charges and expenses. *Fearn v. Young*, 10 Ves. 184.

So the expenses of a sale have been allowed under this head. *Crump v. Baker*, 18 Ves. 285.

But the Master is not at liberty, under this direction, to enter into a substantive claim (as for a commission) made by the answer, and not sustained by the decree. *East India Company v. Keighley*, 4 Mad. 38.

The Court will not determine in the first instance, what is a just allowance. *Brown v. De Tastet*, Jac. 294.

But the Master may be directed, by the original decree, to state his reasons for allowing or disallowing allowances claimed. *Cook v. Collingridge*, Jac. 623. *Brown v. De Tastet*, 299.

For further as to allowances. See Reservation of Interest, *ante*. Decrees respecting Personal Assets, *post*. Decrees respecting Partners, *post*.

(3) *Payment of Balance.*

In *Cartwright v. Hateley*, 1 Ves. jun. 293. it seems to have been thought that decrees for account contained an undertaking on the part of the plaintiff to pay the balance, if found against him; such an undertaking, however, is not usual: but decrees formerly directed that the balance should be paid by the party from whom it was found to be due. *Old v. Old*, No. I. *supra*. *Wane v. Praed*, No. III. *post*. *Howarth v. Powell*, No. IV. *post*. And see Decree respecting Partners, *post*. And Further Directions, *post*.

Decrees for Account generally.

Formerly payment of the balance was directed on the original hearing, although further directions were reserved. *Old v. Old*, No. I. *supra*. *Wane v. Praed*, No. III. *post*. *Howarth v. Powell*, No. IV. *post*.

But of late it is not decreed until further directions. See Reservation of further Directions, *ante*.

(4) See Direction for Payment. Usual Directions, *ante*.

(5) The injunction will be superseded by the decree, unless expressly continued by it. *Old v. Old*, No I. *supra*.

So in the case of a receiver. See Decrees respecting Receivers, *post*.

(6) Costs.

It is the constant course of the Court, where a mutual account is decreed, to reserve the costs till after the report, that the Court may have it in its power to punish the wrong-doer. *Rider v. Bayley*, Vin. Abr. Costs, B. 32. S. C. 2 Eq. Abr. 237. And see *Wane v. Praed*, No. III. *post*. *Howarth v. Powell*, No. IV. *post*.

Otherwise where the account is not mutual, as in the case of tithes. See Decrees respecting Tithes, *post*.

As to costs of bills for account. See Beames on Costs, 11.

MISCELLANEOUS DIRECTIONS.

Wilful Default.

Ordinarily, in decrees for account, the Court does not charge the accounting party with what he might have received without his wilful default. See Decrees respecting Personal Assets, *post*. Decrees respecting Partners, *post*.

Otherwise in the case of mortgagees. See Decrees respecting Mortgages, *post*.

Or under special circumstances. See Decrees respecting Executors and Trustees, *post*.

Whether a charge in the bill of wilful neglect or default is not a sufficient ground for this direction, without admission or proof, Qu.

Special Circumstances.

In *Anon.* 2 Atk. 621. it is said, that in decrees to account there was formerly a clause, that if there should be any special matter in taking the account, the Master might state it specially; but that decrees are now drawn up without this clause; but that the Master may state special circumstances notwithstanding. But whether this is now the practice, Qu. See Liberty to state Special Circumstances.

Usual Directions, *ante*. And see Decrees respecting Personal Assets, *post*.

Rests.

In *Robinson v. Cumming*, 2 Atk. 410. it is said by Lord Hardwicke, that ordinarily, in taking an account of the rents and profits of real estates, the Court has directed annual rests, but not in taking an account of personal estate.

But in the case of all parties accountable, rests have been inserted. See *Raphael v. Boehm*, 11 Ves. 110.

See Decrees respecting Mortgages, *post*. Decrees for Specific Performance, *post*. Decrees respecting Executors and Trustees, *post*.

Rests are sometimes directed generally, sometimes annually, sometimes half-yearly. See Decrees, above referred to.

In general, rests are made in order to see whether interest is to be charged or not. See *Raphael v. Boehm*, *supra*. *Hall v. Hallett*, 1 Cox, 138. And decree in *Tebbs v. Carpenter*, 1 Mad. 293.

Where interest is directed to be computed with rests, there was, formerly, a difference in the practice of the Masters, as to the mode of computing it; some at the time of the rest, carrying the interest to a separate column, and computing subsequent interest on the principal (and thus charging the defendant with simple interest only), and others at the time of the rest, adding the interest to the principal, and computing interest on the aggregate sum (and thus charging the defendant with compound interest). See *Raphael v. Boehm*, 11 Ves. 97. 103. But in that case, it was held that the object of such a direction is to charge compound interest. And see *Stackpoole v. Stackpoole*, 4 Dow. 209. *Tebbs v. Carpenter*, 1 Mad. 300. *Crackelt v. Bethune*, 1 J. & W., 586. *Walker v. Woodward*, 1 Russ. 111.

Special Directions.

It seems that formerly, special directions were usual in decrees for account. See Lord Bacon's Orders, Beames, 23. But of late, it has been held, that the Court will not, in the first instance, make any declaration which would have the effect of taking the account in part. *Hornby v. Hunter*, 1 Russ. 89. But see *Smith v. Wilkinson*, Appendix, (1). *Wane v. Praed*, No III. *post*. *Talwin v. Stoker*, Decrees respecting Partners, *post*.

Nor will it permit evidence to be read, or entered as read, as to such items. *Walker v. Woodward*, 1 Russ. 110. *Law v. Hunter*,

Decrees for Account generally.

1 Russ. 102. And see Admission of Evidence before the Master, Usual Directions, *ante*. Except for the purpose of founding inquiries upon it. See *Hornby v. Hunter*, *supra*.

But in directing an account, the Court frequently directs it to be taken with the admission of documents or testimonies not strictly evidence. See *Lupton v. White*, 15 Ves. 443.

An account may be directed, regard being had to particular circumstances. *Hardinge v. Glyn*, Appendix, (2).

Liberty to attend Master.

A defendant who has no interest in the result of accounts, will not be allowed to attend the Master in taking them. *Pearce v. Crutchfield*, 16 Ves. 48.

A defendant made a party to a suit for carrying into effect the trusts of a will, only in respect of an annuity charged on the real estate by the will (there being no provision in the decree for her attendance before the Master), was not allowed the costs of past attendances; nor to attend in future, unless at her own expense. *Tharpe v. Tharpe*, 3 Mer. 510.

Further Directions.

After a decree for an account, the bill cannot be dismissed, except on a rehearing or appeal. *Lashley v. Hogg*, 11 Ves. 602.

Where it appears, by the Master's report, that the balance is due from the plaintiff, he will be decreed to pay it, although there is no offer in the bill, or direction in the original decree for that purpose. *Bodkin v. Clancy*, 1 Ba. and Be. 216; and see *Domina Stowel v. Cole*, 2 Vern. 297.; and Payment of Balance, Note (3), *ante*.

APPENDIX (1).

Decree for Account, with special Direction.

And in taking the said accounts against the defendant Jacob Wilkinson, the said Master is to charge the defendant Jacob Wilkinson with the sum of 8,000*l.*, borrowed by him from the testor's estate, to enable him to purchase the tithes of Bray, in the pleadings mentioned, together with interest from the time of the purchase, at the rate reserved in the mortgage of the tithes in the pleadings mentioned. *Smith v. Wilkinson*, L. C., 9th of February, 1798. Reg. Lib. B. 1797, fol. 363. For minutes of same decree, see 2 Newl. Pract. 335.

APPENDIX (2).

Decree for Account, regard being had to particular circumstances.

In taking of which accounts, the said Master is to have regard to the said agreement, by the said order of the 1st day of March, 1738, made an order of this Court, relating to the personal estate of the said testator Nicholas Hardinge, which is hereby established, and to be taken as such in the said accounts. *Hardinge v. Glyn*, M. R., 7th June, 1739. Reg. Lib. A. 1738, fol. 438. S. C. 1 Atk. 469.

No. II.

DIRECTION FOR ALLOWING STATED ACCOUNT.

And if, in taking the said accounts, the said Master shall find any account stated, he is not to ravel into the same. *Birkhead v. Manaton*, L. C. 25th January, 1748. Reg. Lib. A. 1748. fol. 308. S. C. (*Wortley v. Birkhead*) 2 Ves. 571. 3 Atk. 809.

NOTE.

Where a stated account is insisted upon by the answer, the above direction is frequently inserted in the decree. See *Dawson v. Dawson*, 1 West, 171. note. S. C. 1 Atk. 1. *Beak v. Beak*, 3 Swan. 627.

But in such case liberty will be given to surcharge and falsify. *Kinsman v. Barker*, 14 Ves. 579.; and see *Champernowne v. Scott*, 4 Mad. 209.

No. III.

DECREE FOR ACCOUNT.

Liberty to surcharge and falsify stated Accounts.

[A bond had been given for the balance of the stated account.]

His Lordship doth think fit and so order and decree, that the account stated the 24th day of May, 1744, between the plaintiff and the defendant do stand, with liberty to either side to falsify or surcharge the same (1). And it is hereby referred to Mr. H. one, &c. to take a general account of all

dealings and transactions between the said plaintiff and defendant, from the foot of the said account; and that the said Master do likewise take an account of what is due for principal and interest on the bond in question, and that the same be brought into the general account (2); and if, in taking the said account between the parties, the Master shall find the said defendant debtor to the plaintiff on the said general account, at any particular period of time, and after that time the plaintiff does not become debtor to the defendant in the said general account, then from such period of time, that the said Master do apply what shall be coming due from the defendant to the plaintiff, first, to pay the interest on the said bond, and then to sink the principal (3). And it is ordered, that what shall appear to be due from either party to the other on the balance of the said account, be paid by such party from whom such balance shall be found due to the other (4). And it is further ordered, that an injunction be awarded to stay the said defendant's proceedings at law on the said bond against the plaintiff, until after the said Master shall have made his report; and for the better clearing of the said accounts before directed, all parties are to produce &c. [See Usual Directions, No. II. *ante*,] And his Lordship doth reserve the consideration of costs (5), and of all further directions, until after the said Master shall have made his report, and any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX, *ante*.] *Wane v. Praed*, L. C. 11th Feb. 1747. Reg. Lib. B. 1746, fol. 233.

NOTES.

(1) Where the parties are at liberty to surcharge and falsify, they are not merely confined to errors in fact, but may take advantage likewise of errors in law. *Roberts v. Kriffen*, 2 Atk. 112.

The *onus probandi* is on the party having that liberty. If any of the parties can show an omission for which credit ought to be given, that is a surcharge; or if any thing is inserted that is a wrong charge, he is at liberty to show it, and that is a falsification; but that must be by proof on his side. *Pit v. Cholmondeley*, 2 Ves. 565.

- (2) See Special Directions, No. I. Note (6), *ante*.
- (3) See Rests, No. I. Note (6), *ante*.
- (4) See Payment of Balance, No. I. Note (3), *ante*.
- (5) See Costs, No. I. Note (6), *ante*.

No. IV.

**DECREE SETTING ASIDE STATED ACCOUNTS,
AND DIRECTING GENERAL ACCOUNT.**

[*Inter alia*] His Lordship declared that the three stated accounts, dated &c. ought to be opened and set aside, and doth order and decree the same accordingly; and it is hereby referred to Mr. S., one, &c. to take a general account of all dealings and transactions between the plaintiffs, or either of them, and the defendant; and also of the value of any timber, &c., in the taking of which account, the said Master is to make unto all parties all just allowances (1); and for the better taking the said account, all parties are to be examined, &c. [See Usual Directions, No. II. *ante*.] And it is ordered and decreed, that what shall be found due upon the balance of the said account from either party to the other, be paid by the party from whom the same shall be found to be due to the others of them (2); and it is ordered and decreed that the said defendant do pay to the plaintiffs their costs of so much of the cause as relates to the setting aside the said stated accounts, to be taxed by the said Master. And his Lordship doth reserve the consideration of the rest of the costs (3) of this suit until after the said Master shall have made his report, and the said parties are to be at liberty to apply, as, &c. [See Usual Directions, No. XIX. *ante*.] *Howarth v. Powell*, L. C. 4th July, 1743. Reg. Lib. A. 1742, fol. 660.

For like decree. See Equity Draftsman, 656.

Decrees for Account generally.

NOTES.

(1) Where an account is opened by either party, the other party is not bound by any deductions agreed to be made by him. *Osborne v. Williams*, 18 Ves. 383.

(2) See payment of Balance, No. I. Note (3), *ante*.

(3) See Costs, No. I. Note (6), *ante*.

DECREES RESPECTING PERSONAL ASSETS.

No. I.

DECREE IN CREDITOR'S SUIT.

This Court doth order and decree, that it be referred to Mr. H. one, &c., to take an account of what is due to the plaintiffs, and all other the creditors (1) of James Robinson, deceased, the intestate in the pleadings named, and of his funeral expenses, and to compute interest (2) on such of the debts as carry interest, after the rate the same respectively carry interest, and the said Master is to cause an advertisement to be published in the London Gazette, and such other public papers as he shall think fit, for the creditors of the said intestate to come in before him and prove (3) their debts, and he is to fix a peremptory day for that purpose, and in default of their coming in to prove their debts by the time so to be appointed, they are all to be excluded (4) the benefit of this decree, but the persons so coming in to prove their debts, not parties to this suit, are, before they are to be admitted creditors, to contribute (5) to the plaintiffs their proportion of the expense of this suit, to be settled by the Master. And it is ordered, that the said Master do take an account of the personal estate (6) of the said intestate, come to the hands of the said defendant, his administrator, or to the hands of any other person by his order, or for his use. And it is ordered, that the said intestate's personal estate be applied in payment of his debts and funeral expenses in a due course of administration. And for the better taking of the said accounts, &c. [See Usual Directions, No. II. *ante*.] And this Court doth reserve the

consideration of all further directions, and of the costs (7) of this suit until after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply, &c. [See Usual Directions, No. XIX. *ante.*] *Dearnaley v. Robinson*, V. C. 51st Dec. 1814. Reg. Lib. A. 1814, fol. 177.

For decree in creditor's suit. See Equity Draftsman, 653.

NOTES.

(1) *Account of Debts.*

In *Attorney General v. Cornthwaite*, 2 Cox, 45. it was said and agreed at the bar, that where a single creditor brought a bill (not on behalf of himself and others), there was no general account of debts directed, but the course was to direct an account of the personal estate, and of that particular debt which was ordered to be paid in a course of administration; and all debts of a higher or equal nature might be paid by the executor, and must be allowed to him in his discharge.

And in *Gray v. Chiswell*, 9 Ves. 123. it was said by Mr. Lloyd, *arguendo*, that according to the old practice, an advertisement for creditors was never introduced into a decree of this kind.

And in *Lord Redesdale*, 136. it is said, that if a bill be brought by a single creditor for his own debt, he may, as at law, gain a preference by the judgment in his favour over other creditors in the same degree, who may not have used equal diligence. That it is otherwise as to legatees. See *Ib.* 137. and Decree in suit by Legatee, No. IV. *post.*

So a bill may be sustained by a single bond creditor for payment of his own debt, as against personal assets. *Machin v. Graves*, cited 2 Dick. 708. *Anon.* 3 Atk. 572. And in *Robinson v. King*, 1 Dick. 297. and *Walter v. Goring*, *Ib.* 299. such a bill was sustained against real assets. But in *Bedford v. Leigh*, 2 Dick. 707., it was held, that by a bill a single bond creditor could not be sustained against real assets. And in *Martin v. Martin*, 1 Ves. 213. Lord Hardwicke said, that on a decree for sale for satisfaction of a bond creditor, not only where it was on behalf of himself and others, but even where the bill was for the satisfaction of his own particular debt, the constant course of the Court was to direct an account of all the bond debts of the testator or intestate, with liberty to come for a satisfaction.

And of late suits by individual creditors, or legatees, not suing on behalf of themselves and others, even in the case of personal estate, are become much out of use. See Mr. Bell's Evidence, Chancery Report, Appendix (A), p. 390.

So on a bill by a creditor under a trust deed for payment of debts, whether on behalf of himself and others or not, the decree should provide, not merely for the payment of the plaintiff, but of all other creditors. *Hamilton v. Houghton*, 2 Bligh, 189.

Where the demand is an equitable one, a bill may be sustained by a single creditor, and the personal representative will be decreed either to admit assets or account. See Decrees respecting Executors and Trustees, *post*.

And Decrees on Bills of Revivor and Supplement, *post*.

And further, as to Bill by single Creditor. See Decrees respecting Real Assets, *post*.

Nature of Debts.

The direction for an account of debts applies to equitable as well as legal ones. *Paynter v. Houston*, 3 Mer. 302. Where the Master finds a difficulty from want of sufficient powers, an application must be made to the Court, S. C. 303. In this case, the claim being by the surviving partners of the testator, in respect of a debt due from him to the partnership on a balance of accounts, the accounts were directed to be taken, S. C. 297.

A joint creditor of the testator, and another person, was permitted to prove, in a suit for the administration of assets, there being no joint property, and the other debtor being bankrupt. *Cowell v. Sikes*, 2 Russ. 191. and see *Gray v. Chiswell*, 9 Ves. 118.

Whether, where the demand is not *prima facie* an immediate demand against the estate, but depends on some collateral circumstances, not within the purview of the decree, application must not be made to the Court. Q.

In *Sterndale v. Hankinson*, 1 Sim. 395. the Vice-Chancellor seems to have thought that the decree in a creditor's suit directed the Master to inquire what debts were owing by the intestate at the time of his decease, and to have inferred from thence, that the Statute of Limitations would not run after the commencement of the suit; and see *Fenhoulhet v. Passavant*, Real Assets, No. V. *post*.

But the usual form is as above; and see Decree in Suit by Legatee, No. IV. *post*. and Decrees respecting Real Assets, *post*.

*Decrees respecting Personal Assets.**(2) Debts carrying Interest.*

The direction for computing interest is expressly confined to the debts carrying interest. *Hamilton v. Houghton*, 2 Bligh. 181. *Creuze v. Hunter*, 2 Ves. junr. 165. And see *Further Directions*, *post*.

It is said, that in giving interest, equity follows the law. See *Boddam v. Ryley*, 1 Bro. 239. *Parker v. Hutchinson*, 3 Ves. 135. *Upton v. Lord Ferrers*, 5 Ves. 803. *Lowndes v. Collens*, 17 Ves. 29.

And in *Dornford v. Dornford*, 12 Ves. 129. it is said, that if interest would be given at law in the shape of damages, the party claiming against the assets in equity shall have the sum which he would have recovered at law.

But it seems that interest will not be allowed in the administration of assets, where it would be given at law in the nature of damages. See 2 Fonbl. 424. note. *Rigby v. M'Namara*, 2 Cox, 420. *Bell v. Free*, 1 Swan, 91. *Exp. Boyd*. 1 G. & J. 297.

Except in the case of a promissory note. *Bell v. Free*, *supra*. *Lowndes v. Collens*, 17 Ves. 27. *Upton v. Lord Ferrers*, *supra*. *Parker v. Hutchinson*, 3 Ves. 133. *Lithgow v. Lyon*, Coop. 29. And of an instrument containing a penalty. See *Interest on Judgments*, *Decrees respecting Mortgages*, *post*.

That the rule is the same in bankruptcy. See *Exp. Cocks*, 1 Rose, 317. *Exp. Williams*, 1 Rose, 399. *Exp. Boyd*, *supra*. With the like exception. See Stat. 6 Geo. 4. c. 16. s. 57.

That at law, interest is allowed only on mercantile securities, or in the case of contract, express or implied. See *Higgins v. Sargent*, 2 B. & C. 349. *Calton v. Bragg*, 15 E. R. 223. *Gordon v. Swan*, 12 E. R. 419. *De Bernales v. Fuller*, 2 Camp. 426. *De Haviland v. Bowerbank*, 1 Camp. 50. *Selwyn N. P.* 340. note.

Whether interest will not also be allowed at law, where interest has been made. Q. See *De Haviland v. Bowerbank*, *supra*.

Interest will be allowed upon the balance of a stated account. *Barwell v. Parker*, 2 Ves. 365.; *Anon.* 2 Eq. Abr. 8 margn. *Duke of Marlborough v. Strong*, 1 Mad. Chan. 102. note. But Q. Unless where a contract arises from the custom of dealing between the parties. See *Ex parte Furneaux*, 2 Cox, 219. *Ex parte Champion*, 3 Bro. 436.

(3) Proving Debts.

For the mode of proving debts before the Master. See 1 Turn. Pract. 195.

In addition to the ordinary evidence of the debt, the Master requires an affidavit from the party, that it remains due. *Burroughs v. Elton*, 11 Ves. 33. *Fladong v. Winter*, 19 Ves. 199. Where the debt is contested, no attention is to be given to the affidavit. *Fladong v. Winter*, *supra*.

The plaintiff, in a creditor's suit, must prove his debt before the Master. See *Newman v. Norris*, 1 Dick. 259.

That creditors who have proved their debts, are not entitled to notice of proceedings of the cause, except such as particularly affect them. See *Hare v. Rose*, 2 Ves. 558.

Costs of Proving Debt.

In *Maxwell v. Wettenhall*, 2 P. W. 27. it was held that a legatee or creditor coming in before the Master, should have his costs, on the ground that it was in his power to have brought a bill for his legacy or debt, which would have put the estate to further charge; and in *Lord Orwell v. Lord Hinchinbrook*, 10 Ves. 356, note, creditors were allowed the costs of proving their debts. So in *Skeene v. Pepper*, *Ib.* But in *Abel v. Screech*, 10 Ves. 355. (which was an application by a creditor for the costs of proving his debt), it was said by the Lord Chancellor, that the first of these cases had not been followed, and that in the last, the point was not particularly discussed, and no order was made; and in *Watkins v. Maule*, Jac. 107. the Master of the Rolls states both these cases to have been overruled, and the practice settled, in *Abel v. Screech*, *supra*. In *Harvey v. Harvey*, 6 Mad. 91. the Vice Chancellor held that a creditor who proves before the Master, has generally no costs; but that if his proof is beneficial to the estate, as where he saves by it the expense of a suit, and there are extraordinary costs, the Court will give them; and in *Waite v. Waite*, 6 Mad. 110. he held it to be a general rule, that creditors and next of kin, going in before a Master to establish their claim as such, pay the expenses of so doing; but that if, after having established their claims, they are permitted to mix in the cause as if they had been parties, then, in respect of such proceedings, they may be entitled to their costs.

A creditor whose proof is disallowed by the Master, but afterwards admitted by the Court, is not entitled to costs. *Watkins v. Maule*, Jac. 105. If the case had been reversed, and the Master had decided in favour of the creditor, and the executor had excepted to

the report and failed, perhaps the creditor might have been considered entitled to the costs occasioned by an improper appeal. S. C. 108.

Where the whole of the fund is divisible among the creditors, creditors will be allowed the costs of proving their debts. Otherwise, where there is a surplus, in which other parties are interested. By the Master of the Rolls, Anon. 28th June, 1828, MS.

For further as to costs of creditors and legatees. See Beames on Costs, 18. 79.

See Contribution, Note (5), *infra*. Costs, No. II. Note (1), *post*.

(4) *Exclusion of Creditors.*

Although the time has elapsed, yet the Court will let in creditors at any time while the fund is in court. *Lashley v. Hogg*, 11 Ves. 602.

The fund having been apportioned among the creditors (the assets being deficient) and transferred to the Accountant-General to pay them and the costs of the suit, a creditor was allowed to come in upon payment of the costs of the application, and of the re-apportionment of the fund. *Angell v. Haddon*, 1 Mad. 529.

A creditor not having come in till after payment to some legatees, and appropriation of the fund to others, was held entitled to part only of the appropriated fund, in the proportion of the whole amount of his debt, to the whole amount of the legacies. *Gillespie v. Alexander*, 3 Russ. 130.

If creditors do not come in, and are excluded from the benefit of the decree, that does not prevent another bill, having due regard to costs. *Good v. Blewitt*, 19 Ves. 339.

Where in a suit by the plaintiff on behalf of himself and others, for an account of the proceeds of a prize, the decree directed an enquiry who were the persons entitled with the plaintiff to the produce, and in what shares, and advertisements to be inserted for that purpose; and the Master of his own authority, but agreeably to practice, having published advertisements declaring that those who did not come in, should be excluded from the benefit of the decree, stated that persons who had not come in were entitled to shares, further advertisements were directed; but payment into court of their shares was refused; and the decree was to be executed only as to those who should come in. *Good v. Blewitt*, 19 Ves. 336.

After distribution under a decree, with the usual advertisements, a bill by a party entitled, but who had no notice of the proceedings, was dismissed. *Farrell v. Smith*, 2 Ba. & Be. 337.

An inquiry as to debts under an interlocutory order does not preclude any creditor. *Hornby v. Hunter*, 1 Russ. 97.

Creditors who do not come in under the decree, will nevertheless be bound by acts done under its authority. Lord Redesdale, 135.

But it seems that they will only be bound as to the demands admitted by the decree, not as to the account of the personal estate taken under it. *Ib.* 139.

See Decree in Suit by Legatee, No. IV. Note (5), *post*.

(5) *Contribution.*

This direction is not acted upon in practice. *Bluett v. Jessop*, Jac. 243. *Lechmere v. Brazier*, 1 Russ. 76.

If the plaintiff does not call for contribution in the manner directed by the decree, he waives his claim to it. *Shortly v. Selby*, 5 Mad. 447. And see *Lechmere v. Brazier*, *supra*.

As the fund brought into court in a creditor's suit, is in part at least, the fund of all the creditors, and as the taxed costs are paid before it is distributed among those who are entitled to it, the plaintiffs and their solicitors receive in effect, the contribution to which the form of the suit and of the decree gives them a right, without going through a formal process for that purpose. See *Lechmere v. Brazier*, 1 Russ. 80. See Costs, No. II. Note (1), *post*.

(6) *Personal Estate specifically bequeathed.*

Although no part of the personal estate can be absolutely exempted from payment of debts, the Court in its ordinary decrees for the administration of the personal estate of a party not intestate, directs at first, only an account of the personal estate not specifically bequeathed. See *Clarke v. Earl of Ormond*, Jac. 115. *Duke of Devonshire v. Atkins*, 2 P. W. 382. And see decrees in *Davies v. Topp*, 1 Bro. 525. And *Lowthian v. Hasel*, 4 Bro. 167. And see Decree in Suit by Legatee, No. IV. Note (1), *post*: and Decrees respecting Real Assets, *post*. If necessary, a decree for a sale of the personal estate specifically bequeathed, may be obtained on further directions. See Direction for that purpose, No. III. *post*. And see *Stuart v. Tichborne*, Decrees respecting Real Assets, No. XIII. *post*.

(7) *Reservation of Costs.*

Sometimes the costs are directed to be taxed, and the payment only is reserved. *Dixon v. Wyatt*, M. R. 12th November, 1814. Reg. Lib. A. 1814. f. 193. And see Costs, No. II. Note (1), *post*.

No. II.

DECREE ON FURTHER DIRECTIONS IN
CREDITOR'S SUIT.

His Honour doth order that it be referred to Mr. J., one &c., to tax the subsequent costs of the defendants the Governor and Company of the Bank of England, and to tax the plaintiffs and the other defendants their costs (1) of this suit, and to compute subsequent interest (2) on the said debts mentioned in the schedule to his report, on which he has computed interest. And it is ordered, that so much of the £—— 4 per cent. annuities, when transferred into the name of the Accountant-General of this court, in trust in this cause, pursuant to the decree, as will raise the amount of such costs when taxed, the sum of £——, the costs already taxed of the defendants the Bank of England, which are directed by the decree to be paid by the plaintiffs, and such debts and interest, be sold with the privy &c. [See Usual Directions, No. XIV. *ante*] And out of the money to arise by such sale, it is ordered, that such costs, when taxed, be paid in manner following, viz. the plaintiff's costs and the said sum of £—— to Mr. R. D. their solicitor; the subsequent costs of the defendants, the Governor and Company of the Bank of England, to Mr. J. K. their solicitor; and the costs of the defendant, M. E. Pickering, to Mr. F. R. C., her solicitor; and thereout, also, it is ordered, that the several sums to be reported due to the several persons named in the schedule to the Master's report, for their debts and interest, be paid to such persons respectively (3), or to the legal personal representatives (4) of such of them as may be dead. And for the purposes aforesaid the said Accountant-General is to draw &c. [See Usual Directions, No. XIV. *ante*.] and any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante*.] Duval v. Pickering, M. R. 1st June, 1815. Reg. Lib. A. 1814. fol. 1657.

For decree on further directions for administration of personal assets. See Equity Draftsman, 662.

NOTES.

(1) *Costs.*

In *Abell v. Screech*, 10 Ves. 358. the Lord Chancellor says, that the leaning of the Court now is, to give the plaintiff (in a creditor's suit) his costs, as far as they can; provided there are assets. And in *Loomes v. Stotherd*, 1 S. & S. 461., the Vice-Chancellor says, that the costs of administering the estate are a first charge upon the estate, whether administered in or out of court. And see *Hare v. Rose*, 2 Ves. 558.

So, on a bill for carrying into effect the trusts of a will, the costs are to be paid out of the general residue. *Howse v. Chapman*, 4 Ves. 550. *Hare v. Rose*, *supra*. But where there is a lapsed share of the residue, the costs of an inquiry as to the next of kin, are borne by the lapsed share. *Chatteris v. Young*. Beames on Costs, 390. *Skrymsher v. Northcote*, 1 Swan. 566.

So, on a bill to settle the priorities of incumbrances, the costs are to be paid out of the fund in the first instance. *White v. Bishop of Peterborough*. Jac. 402.

Where a party entitled to costs is indebted to the estate, the costs must be set off against the debt. *Harmer v. Harris*, 1 Russ. 155.

There being no assets, except a fund which was subject to a lien to a greater amount, the plaintiffs were ordered to pay the costs of the suit, except those of the inquiries relating to the lien, which were to be paid by the parties entitled to the benefit of it. *Bluett v. Jessop*, Jac. 240.

There being no assets unadministered, the bill was dismissed, but not with costs; the account given by the answer not being confirmed by the report. *Robinson v. Elliott*, 1 Russ. 599.

But where there were assets, costs were given to the plaintiff, though the account given to the plaintiff previous to the institution of the suit was verified in the event. *Sharples v. Sharples*, 13 Price, 745.

That where a difficulty is created by the will, the costs are to be paid out of the general assets. See Beames on Costs, 13.

As to the costs of suits by legatees. See Beames on Costs, 14.

As to the costs of administrators. See Beames on Costs, 77. Of executors, *Ib.* 87. Of Trustees, *Ib.* 146.

Ordinarily the plaintiffs are only entitled to costs as between party and party. *Lechmere v. Brasier*, 1 Russ. 81.

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But where the whole of the fund is divisible among the creditors, costs will be given as between solicitor and client. Otherwise where there is a surplus, in which other parties are interested. By the Master of the Rolls, Anon. 28th June, 1828. MS.

Whether in a suit by a simple creditor the plaintiff is not entitled to costs, although the fund is insufficient for payment of the specialty creditors, Q.

See Contribution, No. I. Note (5), *ante*. Costs of proving Debt, No. I. Note (3), *ante*.

(2) Subsequent Interest.

Interest subsequent to the report is only calculated on debts previously carrying interest. *Creuze v. Hunter*, 2 Ves. jun. 165. S. C. 4 Bro. 316. and cases there cited.

It was formerly held, that interest, when computed by the Master, became principal, and would carry interest. See *Bacon v. Clerk*. 1 P. W. 480. But now no interest is given on interest reported due, except in the case of a mortgage. *Turner v. Turner*, 1 J. & W. 47. *Perkins v. Baynton*, 1 Bro. 574. And see *Brown v. Barkham*, 1 P. W. 653. *Butler v. Duncomb*, 1 P. W. 453. *Astley v. Powis*, 1 Ves. 496.

The not allowing interest to simple contract creditors is often attended with great hardship, operating as an inducement to the residuary legatees, where the funds are bearing interest, to protract the proceedings for their own benefit. See Explanatory paper subjoined to the Chancery Report, 99.

The following proposition upon this subject is among those subjoined to the Chancery Report.

Proposition 133. That in all cases it shall be in the discretion of the Court, having regard to the circumstances of the assets, to allow or disallow interest from the date of the report to creditors, whose debts do not in their nature carry interest.

(3) Mode of Payment.

For the mode by which creditors obtain payment of the sums reported due to them. See *Lechmere v. Brazier*, 1 Russ. 75. and Usual Directions, No. XIII. *ante*.

The plaintiff's solicitor is bound to attend the Accountant-General and the Registrar with the order and report, upon payment of the usual fee. *Lechmere v. Brazier*, 1 Russ. 78. And see *Shortley v. Selby*, 5 Mad. 447.

(4) That where the creditor is dead a prerogative administration is necessary. See Usual Directions, No. XIII. *ante*.

Where it appears by the pleadings that the creditor is an infant, the Accountant General will not pay him, though he has attained twenty-one, upon the certificate of his baptism; but an order must be obtained from the Court. Anon. 2 Mad. Chan. 582.

No. III.

DIRECTION FOR SALE OF PERSONAL ESTATE SPECIFICALLY BEQUEATHED, AND FOR APPORTIONMENT ON DEFICIENCY OF ASSETS.

It is ordered, that the said Master do take an account of the testator's personal estate, specifically bequeathed; and it is ordered that the same be sold by the said defendant, in such manner as the Master shall direct. And it is ordered, that the money to arise by such sale, be paid into the Bank, with the privity, &c. [See Usual Directions, No. X. *ante*.] And it is ordered, that the said Master do apportion (1) the money to arise, &c. and the monies hereinbefore directed to be paid into the Bank, when paid in, among the creditors of the testatrix, named in the first schedule to his report, according to the sums reported due to them; and he is to make a separate report of the matters aforesaid; and out of the monies to arise, &c. and the monies hereinbefore directed to be paid into the Bank, when paid in, it is ordered, that the several sums to be apportioned to such creditors, be paid to them respectively, or to the legal personal representatives of such of them as may be dead. And for the purposes aforesaid, the Accountant-General is to draw &c. [See Usual Directions, No. XIII. *ante*.] *Morgan v. Earl of Clarendon*, M. R. 15th July, 1815. Reg. Lib. A. 1814. fol. 1574.

NOTE.

(1) Where any of the debts carry interest, an account of subsequent interest will be directed before apportionment. *Nice v. Kirkby*, M. R. 4th March, 1815. Reg. Lib. B. 1814. fol. 353.

No. IV.

DECREE IN SUIT BY LEGATEE.

This Court doth order and decree that it be referred to Mr. C., one &c., to take an account of the personal estate of (1) William Robert Mingay, the testator in the pleadings named, come to the hands of James Mingay, deceased, the sole executor of the said testator, William Robert Mingay, in the lifetime of him the said James Mingay, and to the hands of the defendants, the executors of the said James Mingay, since his death, or any or either of them, or to the hands of any other person or persons, &c. And it is ordered, that what on the said account shall appear to have come to the hands of the defendants be answered by them personally; and what on the said account shall appear to have come to the hands of the said James Mingay in his life, be answered by the defendants, his executors, out of his assets, in a course of administration. But in case the defendants shall not admit assets &c. [See Decrees respecting Executors and Trustees, *post.*] And it is ordered, that the said Master do take an account of the debts (2), funeral expenses, and legacies (3) of the said testator, William Robert Mingay, and compute interest on such of his debts as carry interest, after the rate, &c. And upon his legacies (4), from the time and after the rate directed by the said testator's will, and where no time of payment or rate of interest is thereby directed, then after the rate of 4 per cent. per annum, from the end of one year after the said testator's death. And it is ordered, that the said Master do cause an advertisement to be published in the London Gazette, &c. for the creditors of the said testator to come in before him and prove their debts; and he is to fix a peremptory day (5) &c. And such of them as shall not come in by the time so to be limited are to be excluded &c. [See Decree in Creditor's Suit, No. I. *ante.*] And it is ordered, that the said testator's personal estate be applied in payment of his debts and funeral expenses in a course of ad-

ministration, and then in payment of his legacies. And for the better taking of the said accounts &c. [See Usual Directions, No. II. *ante.*] And it is ordered, that all parties be paid their costs of this suit, to be taxed by the said Master out of the said testator's estate. And this Court doth reserve the consideration of all further directions until after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply, &c. [See Usual Directions, No. XIX. *ante.*] *Mingay v. Corral*, V. C. 10th June, 1815. Reg. Lib. B. 1814. fol. 1093.

NOTES.

(1) *Personal Estate specifically bequeathed.*

The account is usually confined to the personal estate not specifically bequeathed. See Decree in Creditor's Suit, No. I. *ante.*

In *Geary v. Beaumont*, 3 Mer. 433. The Master of the Rolls said, that where no debts are due from the testator, the Court has nothing to do with the specific legacies, and must confine its administration to the effects not specifically bequeathed; and on that ground held, that a specific bequest to an executor could not be applied in satisfaction of a devastavit committed by him. But the Court will order specific legacies to be delivered to the legatees. *Nieman v. Cartony*, Appendix (1). *Davis v. Bayly*, Appendix (2). *Lord v. Calton*, Decrees respecting Real Assets, No. IX. *post.* And see Decree for Administration of Assets, Equity Draftsman, 660.

Where the personal estate consisted chiefly of debts due to the testator, the produce of which was bequeathed to the plaintiffs, and had been received in part by the executrix, and an account had been directed of the personal estate "not specifically bequeathed," on a motion to rectify the minutes, the latter words were omitted. *Barnes v. Foster*, V. C., 5th of March, 1825, MS. See Decree in Creditor's Suit, No. I. Note (6), *ante.* And Decrees respecting Real Assets, *post.*

(2) *Account of Debts.*

Formerly, creditors were not allowed to come in under a decree in a suit by a residuary legatee. See *Sims v. Ridge*, 3 Mer. 464. But now the Court will not interfere in favour of legatees until the debts are paid, and the fund is clear. See *Exp. Salter*, 2 Dick, 771. *Warter v. ———*, 13 Ves. 94.

*Decrees respecting Personal Assets.**(3) Account of Legacies.*

It is said by Lord Redesdale, 137, that in a suit by a single legatee for his own legacy, unless the personal representative of the testator, by admitting assets for the payment of the legacy, warrants an immediate personal decree against himself, by which he alone will be bound, the Court will direct a general account of all the legacies of the same testator, and payment of the legacy claimed rateably only with the other legacies, no preference being allowed amongst legatees in the administration of assets. Otherwise as to creditors. See Decree in Creditor's Suit, No. I. *ante*. But such bills are now out of use. See Mr. Bell's Evidence, Chancery Report, Appendix (A), p. 390.

For mode of claiming legacy. See 1 Turn. Pract. 195.

(4) Interest on Legacies.

In *Crickett v. Dolby*, 3 Ves. 13. the above direction for the computation of interest is stated by the Master of the Rolls to have been the form universally. But this does not appear to have been invariably the case. *Fenhoulhet v. Passavant*, Appendix (3). *Ellison v. Airey*, Appendix (4). *Loder v. Hallett*, Appendix (5).

For the rules as to the time from which interest on legacies is to commence, and the exceptions to them. See 2 Roper on Legacies, 172.

Decrees in Ireland do not contain any direction for computing interest on legacies, but the direction to take an account of legacies is understood to include an account of interest. See *Birmingham v. Kirkman*, 2 Sch. and Lef. 447.

Annuities.

An annuity given by will is payable from the death of the testator. *Gibson v. Bott*, 7 Ves. 96, 7. *Fearn v. Young*, 9 Ves. 553.

Unless a contrary intention appears. *Houghton v. Franklin*, 1 S. & S. 390. *Storer v. Prestage*, 3 Mad. 167.

Whether it is payable from the death, where it is given out of a residue, Q. See *Storer v. Prestage*, *supra*.

See Tenant for Life of Residue, No. IX. Note, *post*.

Directions will be given for securing annuities. *Trodd v. Downes*, Appendix (6). And see Decrees respecting Real Assets, No. VIII. *post*.

(5) Exclusion of Legatees.

This direction has been extended to legatees. *Davis v. Topp*, Appendix (7). *Gibson v. Stiles*, *Ib.* *Ellison v. Airey*, Appendix (4). *Loder v. Hallett*, Appendix (5); and Decree for Administration of Assets. *Equity Draftsman*, 658.

But this is incorrect. In *Anon.* 9 Price, 210. the Lord Chief Baron observed upon this practice in the Exchequer, and directed that it might be corrected in future. He observed, that the reason why creditors are excluded, unless they should come in within a limited time, is because they could not be known to the Court, or ascertained, unless they should appear, and parties interested were not to be delayed by the laches of creditors; but that did not apply to legatees, who were entitled to have a proportional part of the fund set apart for the satisfaction of their legacies.

And see Decree in Creditors' Suit, No. I. Note (4), *ante*.

Contribution.

A direction for contribution is sometimes added. *Davies v. Topp*, Appendix (7). But see Contribution, No. 1. Note (5), *ante*.

APPENDIX (1).

Direction for Delivery of Specific Legacies.

And it is further ordered, that the specific parts of the testatrix's personal estate, remaining in the hands of the defendant, be delivered by the defendant to the plaintiffs. *Nieman v. Cartony*, L. C. 24th of April, 1771. Reg. Lib. B. 1770, fol. 275.; S. C. (*Newman v. Cartony*) 3 Bro. 346. note.

APPENDIX (2).

Direction for Delivery of Specific Legacies.

And it is further ordered, that the specific legacies be delivered or retained, according to the said testator's will. *Davis v. Bayly*, 8th Feb. 1748. Reg. Lib. A. 1747. fol. 266. S. C. 1 Ves. 84.

[It appeared by the answer of the executrix, that the testator in his lifetime had by parol directed her to give his gold watch, and articles of jewellery to different persons, and at the same time gave the defendant other trinkets.]

APPENDIX (3).

Direction as to Interest on Legacies.

It is further ordered, that the said Master do take an account of his (the testator's) legacies, and compute interest thereon at the rate

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of 4*l.* per cent. per annum, from the time the same respectively carry interest. *Fenoulhet v. Passavant*, L. C. 11th March, 1754. Reg. Lib. A. 1753. fol. 524. S. C. 1 Dick. 253.

APPENDIX (4).

Direction as to Interest on Legacies.

And the said Master is also to take an account of the said testator's debts, &c. and legacies, and compute interest on such of the said debts and legacies as carry interest, from the time such interest ought to commence. And all the creditors and legatees of the said testator are to be at liberty to come before the said Master and prove their debts, and make out their demands respectively, and for that purpose the said Master is to cause an advertisement to be published in the London Gazette, and therein appoint a peremptory day, and such of the said creditors and legatees as shall not come before the Master and prove their debts and make out their demands within that time, are to be excluded the benefit of this decree. *Ellison v. Airey*, L. C. 13th July, 1748. Reg. Lib. A. 1747. fol. 699. S. C. 1 Ves. 111.

APPENDIX (5).

Direction as to Interest on Legacies.

And that it be referred to Mr. K. one &c. to take an account of the said testator's debts, funeral expenses, and pecuniary legacies, and to compute interest on such of his debts as in their nature carry interest, as also to compute interest on his said legacies, at the rate of 4*l.* per cent. per annum, from the time the same ought to have been paid, according to the said testator's will. And the said Master is to cause an advertisement to be published in the London Gazette for the said testator's creditors and pecuniary legatees to come before him and prove their respective debts, and claim their respective legacies within a time to be therein limited, or in default thereof, they will be excluded the benefit of this decree. *Loder v. Hallet*, L. C. 3d April, 1742. Reg. Lib. B. 1741. fol. 305.

APPENDIX (6).

Direction for securing Annuities.

And any of the legatees and annuitants mentioned in the said testator's will are to be at liberty to come before the said Master to claim their legacies or annuities; and as to any annuities thereby

given which are a charge on the said testator's personal estate only, the said Master is to see a sufficient part of the said testator's personal estate set apart and appropriated to answer such annuities during the continuance thereof. *Trodd v. Downes*, L. C. 18th May, 1742. Reg. Lib. B. 1741. fol. 406. S. C. 2 Atk. 304. cited 2 Ves. jun. 568.

APPENDIX (7).

Direction for Contribution by Legatees.

And for the purposes aforesaid, the said Master is to cause an advertisement to be published, &c. for the creditors and legatees, &c., and such of them as shall not come in, &c. are to be excluded, &c., but such creditors, not parties, &c. and legatees are in the first place to contribute, &c. *Davies v. Topp*, M. R. 25th Feb. 1780. Reg. Lib. A. 1779. fol. 228. S. C. 1 Bro. 525.

So in *Gibson v. Stiles*, L. C. 18th July, 1741. Reg. Lib. A. 1740. fol. 550.

No. V.

DECREE ON FURTHER DIRECTIONS IN SUIT
BY LEGATEES.

[The residue was given to charitable uses.]

[*Inter alia*] His Honour doth order that it be referred to the said Master to compute subsequent interest on the legacies, except, &c. And to tax the plaintiffs and the defendants *Henchman &c.* to whom costs are given by the said decree, their subsequent costs. And it is further ordered, that what is reported due for the legacies given to such of the parties and legatees as are not mentioned in the said report to be under age, or *femês covert*, and the interest thereof, be paid to them respectively, out of the cash in the bank in this cause, and that what shall be reported due to them for subsequent interest on their said legacies, be also paid to them out of the said cash in the bank in this cause. And the plaintiff *Dorothy Bowden's* legacy and interest is to be paid to her, or to such person as she shall appoint, for her separate use, out of the said cash in the bank. But before the actual payment of the legacy and interest given to the plaintiff *Decima late*

Warnell, now wife of John Yorke, in regard, she is now resident at Wotton Bassett, Wilts, C. B. Clerk, L. L., Esq. and T. B. Gent, all of &c. or any two of them, are desired to attend her and examine her, separate and apart from her husband, &c. [See Decrees respecting Femês Covert, *post.*] But in case the said plaintiff shall not consent that her said legacy and interest shall be paid to her husband, then he is to lay proposals before the said Master, &c. [See Decrees respecting Femês Covert, *post.*] And it is further ordered that the said defendant Humphry Henchman, be at liberty to retain his subsequent costs, and do pay the said other parties their subsequent costs, when taxed, out of the balance remaining in his hands of the said testatrix's estate, if the same shall be sufficient for that purpose, and do pay the residue of such balance (if any) into the bank, with the privity of the Accountant-General of this court, to be placed to the credit of this cause. But if such balance shall not be sufficient to pay the said subsequent costs, then the said parties are to be at liberty to apply to this court to have such deficiency made good out of the said cash in the bank in this cause. And it is further ordered that the interest, already reported due on the legacies given to Elizabeth and Mary Bowden, the infants, and also the subsequent interest be paid to the plaintiff John Bowden their father, who hath maintained them out of the cash in the bank in this cause. And it is further ordered, that the capital of their said legacies be placed out &c. [See Decrees respecting Infants, *post.*] and the interest of such securities is from time to time to be paid to their said father for their maintenance, so long as he shall continue to maintain them. And the said infants are to be at liberty to apply to this court to have the said securities transferred or assigned to them when they shall respectively become entitled to the payment of their legacies. And it is further ordered, that the sum of 500*l.* the interest whereof is given to Anne Knipe for her life, be laid out &c. in the name and with the privity of the Accountant-General of this court, who is to declare the trusts thereof, subject to the further

order of this court, and the interest thereof is from time to time to be paid to the said Anne Knipe during her life, and on her death, the parties interested therein are to be at liberty to apply to this court touching the same. And his Honour doth declare that the defendant Ettricke the infant is, as heir at law to the said testatrix, entitled to the surplus of the money arising by sale of her real estate. And it is further ordered that what shall be coming to the said defendant on account thereof, be for his benefit laid out, &c. in the name, and with the privity of the said Accountant-General, who is to declare the trust thereof accordingly, subject to the further order of this court. And the said defendant is to be at liberty to apply to this court for the same when he shall attain his age of twenty-one years. And the said Accountant-General is to draw &c. [See Usual Directions, No. XIII. *ante.*] And any of the parties are to be at liberty to apply, &c. [See Usual Directions, No. XIX. *ante.*] *Bowden v. Henchman*, M. R. 1st December, 1747. Reg. Lib. A. 1747. fol. 87.

NOTE.

Where the Master had found a legacy to be due to the representatives of the legatee, and the legacy was directed to be carried to the account of the personal representatives of the legatee, subject to the further order of the Court, and the fund was not to be sold or transferred without notice to the plaintiff, who was entitled to the residue, the legatee, who was one of the executors of the testator, having, in fact, forfeited the legacy by not proving the will, the Court, on the petition of the plaintiff, ordered the fund to be paid to him without directing a re-hearing. *Banksdale v. Abbott*, 3 Russ. 186.

No. VI.

DIRECTION FOR ABATEMENT.

And in case his (the testator's) personal estate shall not be sufficient for the payment of his legacies, then the legatees are to abate in proportion to be settled by the said Master. *Barnard v. Bevan*, M. R. 1st July, 1748. Reg. Lib. A. 1747. fol. 591.

For minutes of decree for setting a value on annuities, and for abatement of legacies. See 2 Newl. Pract. 348.

No. VII.

**DIRECTION FOR APPORTIONMENT OF FUNDS
BETWEEN LEGATEES AND ANNUITANTS.**

[The testator directed funds to be invested for securing an annuity of 200*l.* to his wife Mary Bowker, during her widowhood ; an annuity of 100*l.* to his son David Bowker, for life, and at his death, an annuity of 30*l.* to his son's wife, Maria Bowker, during her widowhood, and subject to the two last annuities, gave the fund for securing such two annuities to the children of his son David Bowker ; and an annuity of 78*l.* to his grandson Bowker Weldon for his life, and at his death, he gave the fund for securing it to the children of his grandson Bowker Weldon ; and he directed that if either his son or grandson should alienate their annuities, they should sink into the residue of his personal estate.]

[*Inter alia*] It is ordered that the said Master do apportion the residue of the money to arise from the aforesaid sales, after the payment of the aforesaid costs and charges and any interest which may accrue due on any of the several bank annuities aforesaid, previously to such sales, among the several legatees and the annuitants named in the third schedule to the said Master's report, in manner following ; that is to say, as to the said several legatees, in proportion to what the said Master has thereby found to be due to them for principal and interest on their respective legacies. And as to the annuity of 200*l.* given by the said testator to his wife, Maria Bowker, during her widowhood, in proportion to what he shall find to be the value of such annuity at the time of the said testator's death, added to the interest on the principal sum so to be ascertained, at the rate of 4*l.* per cent. per annum, up to the date of his former report. And as to the said other annuitants in proportion, according to what he has thereby found to be due for the arrears of their respective annuities, added to the value of such sum in bank 3 per cent annuities, the annual dividends whereof would be sufficient to pay the said annuities. And in making such apportionment in respect of the annuities of 100*l.* and 78*l.* in the said third schedule to this said report mentioned, the said

Master is to distinguish what he shall so apportion in respect of the capital fund necessary for securing the payment of each of the said last-named annuities from what he shall so apportion in respect of the arrears of each of the said last-mentioned annuities. And it is ordered, that what shall be apportioned, in respect of her annuity of 200*l.*, be paid to the said plaintiff Mary Bowker. And it is ordered, that what shall be apportioned in respect of the arrears of the annuity of 100*l.* to the plaintiff David Bowker, be paid to the plaintiff David Bowker. And it is ordered, that what shall be apportioned in respect of the arrears of the annuity of 78*l.* to Bowker Weldon, be paid to the said Bowker Weldon. And it is ordered, that what shall be apportioned in respect of the capital of the said annuity of 100*l.*, be carried over to the credit of this cause, to an account to be entitled, "The plaintiff David Bowker the annuitant's account." And it is ordered, that the same, when so carried over, be laid out in the purchase of bank 3 per cent. annuities, in the name, and with the privity, &c. [See Usual Directions, No. XI. *ante.*] And it is ordered, that the interest to accrue on the said last-mentioned bank annuities, when so purchased as last aforesaid, as and when the same shall accrue due and become payable, be paid to the said plaintiff David Bowker during his life, or until the further order of this Court. And during the life-time of the said David Bowker, any person interested in the said annuity of 100*l.* during his life, and upon the decease of the said David Bowker, the said Maria Bowker, in respect of the said annuity of 30*l.* and also any persons interested in, or entitled to the capital of the said last-mentioned annuity, are to be at liberty to apply to this Court touching the same, as they may be advised. And it is ordered, that what shall be apportioned in respect of the capital of the said annuity of 78*l.* be carried over to the credit of this cause, to an account to be entitled, "Bowker Weldon, the annuitant's account," and the said Accountant-General is to declare the trust thereof accordingly, subject to the further order of

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this Court. And it is ordered, that the same, when so carried over, be laid out in the purchase of bank 3 per cent. annuities, in the name and with the privity &c. [See Usual Directions, No. XI. *ante.*] And it is ordered, that the interest to accrue due on the said last-mentioned bank annuities, when so purchased as last aforesaid, be paid to the said Bowker Weldon during his life, or until the further order of this Court. And during the life of the said Bowker Weldon, any person interested in the said annuity of 78*l.* during his life, and upon the decease of the said Bowker Weldon, any persons interested in, or entitled to the capital of the said last-mentioned annuity, are to be at liberty to apply to this Court touching the same, as they shall be advised. And for the purposes aforesaid the said Accountant-General is to draw &c. [See Usual Directions, No. XIII. *ante.*] *Bowker v. Bowker*, M. R. 23d March, 1829. From an office copy of the order.

NOTE.

Where there are legacies and annuities, and in consequence of the deficiency of the fund interest is not directed to be computed on the legacies, interest will be directed to be computed for one year on the value of the annuities at the testator's death, for the purpose of apportionment. *Anon. Ex relatione Mr. Tinney.*

No. VIII.

INQUIRY AS TO NEXT OF KIN. (1)

And the said Master is also to inquire and state to the Court who were the next of kin of the said testator living at the time of his death, and whether any of them are since dead; and if dead, who is or are their personal representative or representatives. And for that purpose the said Master is to cause advertisements to be published in the *London Gazette*, and such other public papers as he shall think fit, for such next of kin to come in and make out their kindred; and he is to fix a peremptory day for that purpose, and in default thereof they are to be excluded the benefit of this decree (2). And for the better taking, &c. and discovery of the matters afore-

said &c. [See Usual Directions, No. II. *ante.*] *Martin v. Knight*, M. R. 10th of May, 1815. Reg. Lib. B. 1814. fol. 1065.

NOTES.

(1) *Inquiry as to next of Kin.*

On a bill by next of kin, an account has been directed with an inquiry, as to the next of kin. *Bent v. Birch*, Appendix (1). So an account has been directed subject to an inquiry as to the title of the plaintiff as next of kin. *John v. Jones*, Appendix (2).

But of late it has been the practice in all cases where next of kin are concerned, to confine the decree in the first instance to an inquiry as to the next of kin, and to reserve all further directions. See *Reservation of Further Directions*. Usual Directions, No. XV. note, *ante.*

(2) Where the bill is by next of kin, a direction for contribution is sometimes added. See *Contribution*, No. I. Note (5) and No. IV. Note (5), *ante.*

APPENDIX (1).

Decree on Bill by next of Kin, with Inquiry.

This Court doth order and decree, that it be referred to Mr S. one &c., to take an account of the personal estate of J. D. the testator in the pleadings named, not specifically bequeathed &c. And it is ordered, that the said Master do also take an account of the said testator's debts, &c. and compute interest &c. And it is ordered, that the said Master do cause advertisements &c. And it is ordered, that the said testator's personal estate, not specifically bequeathed, be applied in payment &c. And it is ordered, that the said Master do inquire and state to the Court who were the next of kin of the said testator living at the time of his death, and for that purpose, the said Master is to cause advertisements &c. And for the better taking of the accounts &c. And this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after &c. And any of the parties are to be at liberty to apply &c. *Bent v. Birch*, V. C. 9th Feb. 1815. Reg. Lib. A. 1814. fol. 463.

APPENDIX (2).

Decree on Bill by next of Kin, subject to Inquiry.

His Honour doth order that it be referred to Mr. A., one &c., to inquire whether the plaintiffs, or either of them, are or is or not

next of kin of G. J., deceased, the intestate in the pleadings named. And in case the said Master shall find that they or either of them are or is, then it is ordered and decreed, that the said Master do take an account of the personal estate of the intestate &c. And it is ordered, in case the said Master shall take such last-mentioned account, he do also take an account of the said intestate's debts &c. ; and he is to compute interest, &c. and for that purpose he is to cause advertisements &c. And it is ordered that the personal estate of the said intestate be applied in payment of his debts &c. And in case the said Master shall find the plaintiffs, or either of them, are or is any of such next of kin, then it is ordered that the said Master do inquire and state to the Court who are such next of kin, if any, besides the plaintiffs, and whether any or either of them is or are since dead, and if dead, who is or are, his her or their personal representative or representatives. And for the better taking of the said accounts &c. And His Honour doth reserve the consideration of all further directions, and of the costs of this suit, until after &c. ; and any of the parties are to be at liberty to apply &c. John v. Jones, M. R. 10th November, 1814. Reg. Lib. A. 1814. fol. 330.

No. IX.

**DECREE ON BILL BY TENANTS FOR LIFE OF
A RESIDUE.**

[*Inter alia*] His Lordship doth order and decree, that it be referred to Mr. S. one &c. to take an account of the personal estate of the testator Daniel Weir, not specifically bequeathed, come to the hands of &c. [See Decree in Suit by Legatee, No. IV. *ante*.] And it is further ordered, that the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses, in a course of administration, and then in payment of his legacies. And if the Master shall find that any of the testator's debts or legacies have been paid, the said Master is to distinguish and state what has been paid for principal thereof respectively, and what has been paid for interest thereof respectively, and when such payments respectively were made, and is to ascer-

tain what was the clear residue of the testator's personal estate at his death. And the said Master is to inquire and state what part of the said testator's personal estate hath, from time to time since his death, produced interest or dividends, and the amount of such interest or dividends, and is to inquire and state to the Court what sums of money received for interest and dividends accrued upon or from any part of the testator's estate have been laid out at interest, or in the funds. And the said Master is to state the amount of the interest and produce of the sums of money received and laid out as last mentioned, and is to state in what securities or funds such sums of money, and the produce thereof, are now invested, and have from time to time been invested. And in taking the accounts herein directed, the said Master is to inquire and state what part of the said testator's estate was invested in the funds at the time of his death, or hath been invested therein by his executors, or either of them since that time; and the said Master is to distinguish in what funds such investments respectively were or have been made. And if the said Master shall find that any part of such funds did not or do not consist of bank 3 per cent. annuities, the said Master is to inquire and state what dividends would have arisen, and have accrued, if such of the said funds not being bank 3 per cent. annuities, as were purchased before the death of the said testator had been sold, and the money arising thereby had been laid out in the purchase of bank 3 per cent annuities at the death of the testator, and also what dividends the same would have produced if so sold and laid out at the end of twelve months after the death of the said testator, and also what dividends would have been produced from such funds not consisting of bank 3 per cent annuities, purchased since the death of the testator, if the monies wherewith the same were purchased respectively, had at the time or times of such respective purchases, been laid out in such bank 3 per cent annuities, and not in such other funds. And the said Master is to inquire and state to the Court what sums of money have been paid to William Weir, Thomas Weir, Frances Weir,

and Grace Weir, to whom the interest of the clear residue of the said testator's estate was given for their lives and the life and lives of the survivors and survivor of them on account of such interest. And for the better taking the accounts &c. [See Usual Directions, No. II., *ante.*] And his Lordship doth reserve the consideration of all further directions, and of the costs of this suit until after &c. [See Usual Directions, No. XV. and XVII. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Smith v. Wilkinson*, L. C. 9th February, 1798. Reg. Lib. B. 1797. fol. 363.

For minutes of same decree. See Newl. Pract. 335.

For minutes of decree for like purpose. See *Terrier v. Sprot*, 2 Newl. Pract. 321.

NOTE.

Tenant for Life of Residue.

As between the tenant for life and the remainder-man, such part of the residue as does not consist of real securities, (if not given specifically,) must be converted into 3 per cent. consols, and the dividends paid to the tenant for life. *Howe v. Earl of Dartmouth*, 7 Ves. 137. and cases there cited.

If any part is invested on real security, an inquiry will be directed whether it will be for the benefit of the parties interested to call it in. *Howe v. Earl of Dartmouth*, *supra*.

As to the period at which the interest of the tenant for life of a residue is to commence, Q.

In *Entwistle v. Markland*, 6 Ves. 528. note. interest was given to the second tenant for life, from the death of the first, the fund not having been invested during the life of the first; and see what is said of this case in *Sitwell v. Bernard*, 6 Ves. 538.

In *Stuart v. Bruere*, 6 Ves. 529. note. interest was given from the decree which was within a year from the testator's death; and see what is said of this case in *Sitwell v. Bernard*, 6 Ves. 536.

In *Sitwell v. Bernard*, 6 Ves. 520. interest was given from the end of a year after the testator's death. So in *Stott v. Hollingworth*, 3 Mad. 161. *Noel v. Ld. Henley*, 7 Price, 241. *Taylor v. Hibbert*, 1 J. & W. 308. *Griffith v. Morrison*, 1 J. & W. 311. note. *Kilvington v. Gray*, 2 S. & S. 396. And see *Walker v. Shore*, 19 Ves. 387. *Benson v.*

Maude, 6 Mad. 15. Parry v. Warrington, 6 Mad. 155. Amphlett v. Parke, 1 Sim. 275.

In Gibson v. Bott, 7 Ves. 89. interest upon part of the residue (consisting of farming stock) was given from the conversion ; and upon part (consisting of leasehold estates the conversion of which could not take place in consequence of a defect in the title) from the death.

In Fearn v. Young, 9 Ves. 549. interest was given from the death. So in Casamajor v. Strode, 19 Ves. 390. note. Fitzgerald v. Jervoise, 5 Mad. 25.

In Angerstein v. Martin, Turn. 232. interest was given from the death of the testator upon such part of the residue as was invested at his death. So in Hewitt v. Morris, Turn. 241. Vere v. Bacon, M. R. 22d July, 1824, MS.

In La Terriere v. Bulmer, 2 Sim. 18. interest accrued within the year was given upon such part of the residue as was invested at the death of the testator, and such part as was invested by the executors within the year.

Inquiries will be directed as to how much of the fund has arisen from interest, and how much from capital, in order to determine between the tenant for life and the remainder-man. See Fearn v. Young, 9 Ves. 552. Smith v. Wilkinson, *supra*. Terrier v. Sprot, 2 Newl. Pract. 321.

In the Exchequer, in taking an account of a testator's personal estate come to the hands of the executors, the decree directs that in taking the accounts the Master shall distinguish what is principal of the testator's personal estate and what is interest thereof. All monies which became due in the lifetime of the testator, though consisting of interest, are to be considered as principal, and only interest subsequently accrued is to be considered as interest. See 2 Fowl. 280.

No. X.

**DECREE FOR THE ADMINISTRATION OF THE
ESTATE OF A FREEMAN OF LONDON.**

[The testator bequeathed the residue of his personal estate to his wife, and appointed her his executrix, and directed her to maintain his daughter till twenty-one, or marriage.

During the marriage he purchased a leasehold estate in the joint

names of himself and his wife, which was held a fraud upon the custom.

The wife afterwards married the defendant, Elling.

Before her second marriage she assigned the leasehold estate to trustees for her, of whom the defendant, Rogers, was the survivor.

The daughter died under twenty-one, and the wife administered to her, and claimed her orphanage part.].

His Lordship doth order and decree, that it be referred to Mr. S. one &c. to take an account of the personal estate of the testator Joshua Coomes and of the income and produce thereof, which has been received by the defendant Ellings and his wife, or either of them, or by any other person or persons &c. And the said Master is also to take an account of the rents and profits of the said testator's leasehold estate in N. S., which have been received by the defendant Elling and his wife, or by either of them, or by any other person or persons &c. And the said Master is also to take an account of the said testator's debts and funeral expenses. And the said testator's personal estate is to be applied in payment of his debts and funeral expenses in a course of administration. And it is further ordered, that the clear surplus of the said testator's personal estate be divided into three equal parts, whereof one-third is to be considered as the widow's share; one other third part as the orphanage share; and the remaining third part thereof is to be considered as the dead man's share. And the said Master is also to take an account of the said testator's legacies, which are to be satisfied out of the testamentary part of his estate. And His Lordship declared that the account settled between the plaintiff and the defendant Constance ought to stand and not to be unravelled; but with liberty to any of the parties to surcharge or falsify the same. And further declared, that the leasehold estate held of the vicar of St. Martin's-in-the-Fields ought to be considered as part of the said testator's personal estate, and the same and the profits thereof accounted for as such. And it is ordered and decreed, that the said testator's leasehold estate be sold before the said Master &c. [See Usual Directions, No. VI.

ante.] And the money arising by such sale is to be applied in like manner as the rest of the personal estate is directed to be applied. And the said Master is to ascertain what the defendant Constance is entitled to for her widow's chamber and paraphernalia ; and the same, with the widow's third part or share, and the residue of the testamentary part of the said testator's personal estate, after deducting his legacies, is to be retained by the defendants Elling and his wife, subject to such agreement as is made on their marriage. And as to the third part of the said testator's personal estate, which is the orphanage part, his Lordship declared, that the plaintiff is entitled to one moiety thereof in his own right, and to the principal of the other moiety thereof, as having survived his sister Mary, after deducting thereout what shall be allowed for her funeral, as is hereafter mentioned. And it is ordered, that what shall be so coming to the plaintiff for the said third part, be paid to him accordingly. And as to the interest and income arising on the said Mary's share of the orphanage part during her life, the same is to be allowed to the defendants, Elling and his wife, for her maintenance. And it is further ordered, that the said Master do inquire what ought reasonably to be allowed for the funeral of the said Mary ; and that so much as the said Master shall find ought reasonably to be allowed, be deducted out of the principal of her said share of the orphanage part. And the defendant Rogers is to be paid his costs of this suit, to be taxed by the said Master, out of the said testator's personal estate. And for the better taking of the said accounts the parties are to produce &c. [see Usual Directions, No. II. *ante.*] as the said Master shall direct, who in taking of the said account is to make unto the parties &c. and particularly an allowance to the said defendants Elling and his wife for any monies laid out in repairs and customary improvements upon the said leasehold estate in N. S. And his Lordship doth reserve the consideration of the costs of this suit, as between the plaintiff and the other defendants, and of all further directions, until after &c. [See Usual Directions, Nos. XV. and XVII. *ante.*] And

any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Coomes v. Elling*, L. C. 2d March, 1748. Reg. Lib. A. 1747. fol. 512. S. C. 3 Atk. 676.

No. XI.

INQUIRY WHERE MISTAKE IN DESCRIPTION OF FUND.

This Court doth order that it be referred to Mr. A. one &c. to inquire and state to the court, whether Faith Taylor the testatrix, in the pleadings in this cause named, had standing in her name in the books of the Governor and Company of the Bank of England, at the time of making her will, and of her death, 1000*l.* five per cent. annuities, and in case she had not such bank annuities standing in her name at the respective times aforesaid, then he is to inquire and state to the Court what annuities or stock the said testatrix had standing in her name in the books of the Governor and Company of the Bank of England, at the time of the making of her will, and of her death. And the said Master is to inquire and state to the Court, what annuities or stock were meant by the said testatrix, by the description in the will of 1000*l.* five per cent. stock. And the said Master is to state any matter specially to the Court, at the request of either party. And for the better discovering of the matters aforesaid &c. [See Usual Directions, No. I. *ante.*] *Fardy v. Musto*, V. C. 17th June, 1823. Reg. Lib. A. 1822. fol. 2268.

No. XII.

INQUIRY WHERE MISTAKE IN DESCRIPTION OF LEGATEE.

[The bequest was in trust for such of the children of the testator's late aunt, Diana Walker, as should be living at the time of his decease, and for the issue or descendants, who should be living at the time of his decease, of such of the children of his said aunt as should have died in his lifetime.

He had no such aunt.]

It is ordered that the said Master do inquire and state to the Court what person the said testator meant by the description of his late aunt Diana Walker, and what children of such person were living at the testator's death, and what issue or descendants were living at the time of the said testator's death of such of the children of the person aforesaid, as died in the said testator's lifetime. And, in case the said Master shall find that any of such children, issue, or descendants, who were living at the said testator's decease, have since died, then he is to inquire and state to the Court, who are their personal representative or representatives. And for the better discovery of the matters aforesaid &c. [See Usual Directions, No. I. *ante.*] *Shearman v. Jennett*, M. R. 29th January, 1825. Reg. Lib. B. 1824, fol. 436.

NOTE.

See *Masters v. Masters*, 1 P. W. 425. *Beaumont v. Fell*, 2 P. W. 141. *Baylis v. Attorney-General*, 2 Atk. 239. *Hunt v. Hort*, 3 Bro. 312. *Abbot v. Massie*, 3 Ves. 148. *Norman v. Morrell*, 4 Ves. 769.

DECREES RESPECTING REAL ASSETS.

No. I.

DIRECTION FOR ESTABLISHING WILL.

His Lordship doth declare that the will of the said testator Benjamin Haskins Stiles, is well proved, and ought to be established, and the trusts thereof performed, and doth therefore order and decree the same accordingly. *Gibson v. Stiles*, L. C. 18th July, 1741. Reg. Lib. A. 1740. fol. 550.

No. II.

WHERE WILL ADMITTED.

His Lordship declared that the will of the said testator being admitted by the said defendant Philip Herbert, his heir at law ought to be established, and the trusts thereof performed, and doth order and decree the same accordingly. *Loder v. Hallett*, L. C. 3d April, 1741. Reg. Lib. B. 1741. fol. 305.

NOTE.

Establishing Will.

At law it is sufficient to examine one witness to prove a will, if he can prove the due execution of it, unless it is impeached. See Peake's Evidence, 401. But in equity, on proving the will against the heir, all the witnesses must be examined. *Bootle v. Blundell*, 19 Ves. 505. S. C. Coop. 137. *Ogle v. Cook*, 1 Ves. 177. *Townsend v. Ives*, 1 Wils. 216. *Bullen v. Mitchell*, 2 Price, 491. In *Powell v. Cleaver*, 2 Bro. 504. Lord Thurlow seems to have doubted the rule. But in *Bootle v. Blundell*, *supra*, Lord Eldon affirmed it. And the same rule applies to the trial of an issue, *dev. vel non*. S. C. 19 Ves. 494. Coop. 136. But it seems that the rule does not apply where the will is not wholly, but only partially in question, S. C. 19 Ves. 505.

The rule, however, admits of exceptions; as in the case of the death of one of the witnesses. See case by Lord Hardwicke, cited from Mr. Joddrell's Notes, 19 Ves. 505. And see *Townsend v. Ives*, 1 Wils. 216. (in which the rule is stated to be that all the witnesses, if living, must be examined.) So in the case of the absence of one of the witnesses abroad, proof of his hand-writing was held sufficient. *Lord Carrington v. Payne*, 5 Ves. 411. And see *Billing v. Brooksbank*, cited 19 Ves. 505. And this has been since acted upon. *Anon. Ex. Rel. Mr. Tinney*. But see *Fitzherbert v. Fitzherbert*, 4 Bro. 231. *Grayson v. Atkinson*, 2 Ves. 460. So where one of the witnesses had become insane. *Bernett v. Taylor*, 9 Ves. 381. And see *Currie v. Child*, 3 Camp. 283. So where one of the witnesses had not been heard of for many years, and could not be found. *James v. Parnell*, 1 Turn. 417. *M'Kenire v. Fraser*, 9 Ves. 5. And see *Cunliffe v. Sefton*, 2 E. R. 183.

In equity it is also necessary to prove the sanity of the testator. *Harris v. Ingledew*, 3 P. W. 93. *Wallis v. Hodgeson*, 2 Atk. 56.

Where the proof is defective, liberty will be given to exhibit interrogatories to supply the defect. See Decree for cause to stand over &c. No. II. *post*.

Where the proof, though not formal, is satisfactory to the Court, the trusts of the will will be directed to be carried into execution, without declaring the will well proved. See *Binfield v. Lambert*, 1 Dick. 337. *Bird v. Butler*, *Ib.* note. *Fitzherbert v. Fitzherbert*, 4 Bro. 231. *Wood v. Stane*, 8 Price, 615.

Formerly, where the heir at law was abroad, or not to be found, the Court (as in the case of informality in the proof of the will,) directed the execution of the trusts without declaring the will well proved. See *French v. Baron*, 1 Dick. 138. S. C. 2 Atk. 120. *Stokes v. Taylor*, 1 Dick. 349. *Cator v. Butler*, 2 Dick. 438. *Braithwaite v. Robinson*, *Ib.* 439. note. But the Court will declare the will well proved notwithstanding the absence of the heir. *Bannister v. Way*, 2 Dick. 599. *Williams v. Whinyates*, 2 Bro. 399. The heir, however, will not be bound by this declaration. See *Lord Redesdale*, 140. So where the heir makes default the Court will declare the will well proved. See Decrees by Default &c. No. I. Note (1.) *post*. So where he declines an issue. *Jackson v. Barry*, 2 Cox, 225.

Where the heir admits the will the Court will establish it, without

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declaring it well proved. *Loder v. Hallett*, No. II. *supra*. *Ithel v. Bean*, No. X. *post*. *Lord v. Calton*, No. IX. *post*. That the admission of a femê covert answering separately under an order for that purpose is sufficient. See *Codrington v. Earl of Shelburne*, 2 Dick. 475.

That the admission of an adult heir will not bind his infant heir. See *Cartwright v. Cartwright*, 2 Dick. 545.

That where the heir states the execution of the will as to his belief only, the will must be proved. See *Potter v. Potter*, 1 Ves. 274.

Whether, in other cases, the belief of the defendant is a sufficient ground for a decree. Q. See *Potter v. Potter*, *supra*. *Hill v. Binny*, 6 Ves. 738. Com. Dig. "Chancery" T. 7.

No. III.

**DECREE IN SUIT BY BOND CREDITOR (1),
WHERE ASSETS LEGAL.**

[The plaintiff's annuity was secured by bond].

His Honor doth think fit, and so order and decree that it be referred to Mr. A. one &c, to take an account of the said intestate Francis Barefoote's personal estate, come to the hands of the said defendant, or to the hands of any other person or persons by his order, or for his use. And the said Master is also to take an account of what is due to the plaintiff for the arrears of his annuity, and of all other the said intestate's debts and funeral expenses. And it is ordered and decreed that the said intestate's personal estate be applied in payment of what shall be so reported due to the plaintiff, and of his other debts and funeral expenses, in a course of administration. And in case the said intestate's personal estate shall not be sufficient for that purpose, then the said Master is to take an account of the rents and profits (2) of the real estate of the said intestate received by the said defendant, or by any other person or persons by his order, or for his use, and thereout the said plaintiff and the said intestate's other specialty creditors are to be paid what shall be remaining due to them as aforesaid. And in case the said rents and profits shall not be sufficient, then it is ordered and decreed that the said

intestate's real estate or a sufficient part thereof be sold (3) &c. [See Usual Directions, No. VI. *ante.*] And out of the money arising by such sale, the plaintiff and the other specialty creditors of the said intestate are to be paid what shall be remaining due to them. And in case the said intestate's specialty creditors (4) shall exhaust any part of his personal estate in payment of their demands, then the said intestate's simple contract creditors are to come in and receive a satisfaction *pro tanto* out of his real assets. And his Honor doth reserve the consideration of the costs of this suit, and of all further directions until after the said Master shall have made his report. And for the better clearing of the accounts before directed &c. [See Usual Directions, No. II. *ante.*] Gregory v. Barefoote, M. R. 23rd Nov. 1747. Reg. Lib. A. 1747. fol. 101.

NOTES.

(1) *Bill by Bond Creditor.*

At law a bond creditor is entitled to charge the heir as a debtor, and to have execution against the whole of the lands descended. See Jeffreson v. Morton, 2 Saund. 7 a. note. Tidd's Pract. 945. Therefore, on a bill by a bond creditor against the heir of the obligor, the Court will direct a sale of the entirety. See Stileman v. Ashdown, 2 Atk. 608. Curtis v. Curtis, 2 Bro. 629. But at law a judgment creditor is only entitled to charge the heir as tenant, and to have execution against a moiety of the lands descended. See Jeffreson v. Morton, 2 Saund. 7. note. Therefore, on a bill by a single judgment creditor, not on behalf of himself and others, against the heir of the conusor, the Court will only accelerate payment by directing a sale of moiety. Stileman v. Ashdown, 2 Atk. 477. 608. 610. S. C. Ambl. 13. Rowe v. Bant, 1 Dick, 150. Burroughs v. Elton, 11 Ves. 33. O'Gorman v. Comyn, 2 Sch. & Lef. 150. Otherwise where there are more judgment creditors than one. Burroughs v. Elton, *supra*. So upon a bill by a single judgment creditor against the conusor to set aside a fraudulent conveyance, the Court will only give relief as to a moiety. See Higgins v. York Buildings Company, 2 Atk. 107. Otherwise where there are more judgment creditors than one. S. C.

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Where judgment creditors come into equity to remove a fraudulent conveyance, the Court will not decree a sale, but will leave them to their elegit. *Higgins v. York Buildings Company, supra.*

As to form of judgment against heir, whether general or special. See *Jeffreson v. Morton*, 2 Saund. 7 a. note. *Tidd's Pract.* 946.

As to what are assets by descent. See 2 Saund. 8 a.

For redemption by judgment creditor. See *Decrees respecting Mortgages*, No. XI. *post.*

For bill by single bond creditor. See *Personal Assets*, No. I. note (1), *ante.*

(2) Rents and Profits.

At law a bond creditor is only entitled to judgment against the heir for the lands descended of which he was seised at the time of suing the original writ or filing the bill. See *Jeffreson v. Morton*, 2 Saund. 7 a. note. And see *Form of Judgment against Heir*. *Tidd's Appendix*, 302. But in equity he is also entitled to an account of the mesne profits from the death of the obligor. See *Curtis v. Curtis*, 2 Bro. 628. 633.

In *Rowe v. Bevis*, 1 Dick, 178. it is said, that the rents and profits of a real estate descended are to be accounted for and applied before the inheritance is sold and applied. And see *Gregory v. Barefoote, supra.* But usually the rents and profits are only directed to be applied in case of the deficiency of the produce of the sale. See what is said by Mr. Dickens, in *Bedford v. Leigh*, 2 Dick. 709. And see *Davies v. Topp*, No. VI. *post.* *Wride v. Clarke*, No. VII. *post.*

So in the case of equitable assets. *Wride v. Clarke*, No. VII. *post.* *Fenoulhet v. Passavant*, No. V. *post.* *Silk v. Prime*, 1 Dick. 385. But see *Plunket v. Penson*, No. IV. *post.* *Lowthian v. Hasel*, 4 Bro. 167. *Dence v. Smith*, M. R. 16th June, 1826. Reg. Lib. A. 1825. fol. 1335.

(3) Sale.

In *Holme v. Stanley*, 8 Ves. 2. it is said by the Lord Chancellor, that the old habit of the Court was first to administer the personal estate, and in case of a deficiency to raise the residue from the real estates. But that the habit of the Court now is, if the Master foresees that the personal estate will be deficient, to permit a sale of the real estate in the mean time. And see *Lloyd v. Johnes*, 9 Ves. 65. *Curtis v. Price*, 12 Ves. 105.

But it seems that formerly a sale was usually directed on the original hearing. *Gregory v. Barefoote, supra*; and Decrees for Administration of Real Assets, which follow.

And that of late a sale is not decreed until further directions. See Modern Decree for Administration of Real Assets, No. XVI. *post*. Reservation of further Directions. Usual Directions, No. XV. *ante*.

A purchaser under the decree is not affected by irregularity in the decree, in directing a sale, or in the proceedings under it, as where more land is sold than is necessary. *Lutwych v. Winford*, 2 Bro. 248.

Or where the account of the personal estate is omitted to be taken. *Lloyd v. Johnes, supra*.

Or where no account of the personal estate is directed. *Curtis v. Price, supra*. *Bennett v. Hamill*, 2 Sch. & Lefr. 566.

(4) *Direction for marshalling.*

In *Sharpe v. Earl of Scarborough*, 4 Ves. 542. it is said by the Solicitor-General, that the common direction in every decree, as to marshalling the assets, expressly mentions specialty creditors, but does not refer to judgment creditors. And see *Gregory v. Barefoote, supra*. *Bedford v. Leigh*, 2 Dick. 709. *Grosvenor v. Cook*, 1 Dick. 305. *Wride v. Clarke*, No. VII. *post*. *Fenoulhet v. Passavant*, No. V. *post*. *Newton v. Bradshaw*, Appendix (1).

But the direction for marshalling has been extended to judgment creditors. See *Trelawney v. Booth*, 1 West, 442. S. C. 2 Atk. 307. *Mainwaring v. Ellerker*, Appendix (2). *Bowen v. Prentice*, Ib. *Blatch v. Wilder*, 1 West, 324. S. C. 1 Atk. 420. (Q. the last case, as the direction in the decree corresponds with that in the case of equitable assets. See *Equitable Assets, post*; although the assets were held to be legal.) And see *Finch v. Earl of Winchelsea*, 3 P. W. 399. note.

Where there are mortgagees, the direction for marshalling is expressly extended to them. See *Davies v. Topp*, No. VI. *post*.

The effect of this direction is not to prevent the specialty creditors from being paid in full. And this is sometimes so expressed. See Decree in *Wride v. Clarke*, No. VII. *post*. But only to prevent their being so paid to the prejudice of the simple contract creditors.

The direction is usually prospective. *Gregory v. Barefoote, supra*. *Mainwaring v. Ellerker*, Appendix (2). *Newton v. Bradshaw*, Appendix (1). *Fenoulhet v. Passavant*, No. V. *post*. *Wride v. Clarke*,

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No. VII. *post*. In *Davies v. Topp*, No. VI. *post*, it was retrospective. But whether in that case it extends to sums received previous to the filing of the bill, Q. See *Equitable Assets*, No. IV. Note (4) *post*.

Further Directions.

In *Gibbs v. Ougier*, 12 Ves. 416. it was said *arguendo*, and assented to by the Master of the Rolls, that if the Court sees at any period, that creditors by simple contract will be deprived of their debts by specialty creditors going against their fund, the Court will of itself, without being called upon, direct the assets to be marshalled, and in that case a decree was made for marshalling the assets, though the bill was not framed with that view.

But in *Pott v. Gallini*, 1 S. & S. 206. a decree was made in a creditor's suit for marshalling the assets, notwithstanding a prior decree in another suit for the administration of the estate.

APPENDIX (1).

Direction for marshalling Assets.

And in case the specialty creditors of the said testator shall exhaust any part of the said testator's personal estate, the simple contract creditors of the said testator are to stand in their place, and receive a satisfaction *pro tanto* out of the monies which shall arise by such sale. *Newton v. Bradshaw*, L. C. 7th July, 1801. Reg. Lib. B. 1800. fol. 932.

APPENDIX (2).

Direction for marshalling Assets as to Judgment Creditors.

And in case any of the creditors by specialty or judgment of the said testator, shall exhaust any part of his personal estate, then the creditors by simple contract are to stand in their place to receive a satisfaction *pro tanto* out of the real estate. *Mainwaring v. Ellerker*, M. R. 3d July, 1747. Reg. Lib. B. 1746. fol. 396.

So in *Bowen v. Prentis*, L. C. 9th November, 1747. Reg. Lib. A. 1747. fol. 113.

No. IV.

DECREE WHERE ASSETS EQUITABLE.

[The testator was *cestui qui trust* in fee of estates, which he mortgaged in fee (1), and charged by his will with debts.]

[*Inter alia.*] The defendant Joseph Penson the heir at law of the testator Thomas Penson having admitted his will, his Lordship declared the same ought to be established &c. [See Establishing Will, No. II. *ante*], and doth order and decree the same accordingly, and that it be referred to Mr. H. one &c. to take an account of what is due to the said defendants Bramston and Mabbat for principal and interest on their respective mortgages, and to tax them their costs of these suits. And also to take an account of what is due to the plaintiffs in both causes, and to all other the creditors of the said testator for their respective debts, and to compute interest &c. and to this end the said Master is to cause an advertisement &c. and the said Master is likewise to take an account of the said testator's personal estate, come to the hands of &c. [See Decree in Creditor's Suit, Personal Assets, No. I. *ante*.] And such personal estate is to be applied in payment of the debts of the said testator in a course of administration. And in case the said testator's personal estate shall not be sufficient to pay his debts, then the said Master is take an account of the rents (2) and profits of the said testator's real estate which have accrued since his death, and have come to the hands of &c. [See Decree in Suit by Bond Creditor, No. I. *ante*], and the same are to be applied in payment of the said testator's debts not satisfied out of his personal estate, *pari passu*. And in case the personal estate and the rents and profits of the real estate of the said testator shall not be sufficient to pay his debts, the mortgagees now submitting to a sale (3) of the said real estate, It is ordered and decreed that the said real estate or a sufficient part be sold &c. [See Usual Directions, No. VI. *ante*.] And the money arising by the said sale is to be applied in the first place in payment of what the said Mas-

ter shall certify to be due to the said defendants, the mortgagees respectively for their principal, interest and costs, according to their respective priorities, and in the next place, in payment of what shall be remaining due to the other creditors of the said testator *pari passu*. And if any of the creditors by specialty (4) have exhausted or shall exhaust any part of the said testator's personal estate in the satisfaction of their debts, then they are not to come upon or receive any further satisfaction out of the said testator's real estate, until the other creditors of the said testator shall thereout be made up equal to them. And in case there shall be any surplus remaining of the money arising by sale of the said testator's real estate after the payment of his said debts, It is ordered and decreed, that the same be paid to the said defendant Joseph Penson. And for the better taking of the aforesaid accounts &c. [See Usual Directions, No. II. *ante*.] And the said Master is also to tax the plaintiffs in both causes, and the defendants Plunkett and Penson their costs of these suits to this time, which are to be paid them out of the said testator's estate. And his Lordship doth reserve the consideration of their subsequent costs until after the said Master shall have made his report. And the said parties are to be at liberty to apply (5) to this Court, as &c. [See Usual Directions, No. XIX. *ante*.] *Plunket v. Penson*, and *Visc. Carrington v. Penson*, L. C. 3d April, 1742. Reg. Lib. B. 1741. fol. 228. S. C. 2 Atk. 290.

NOTES.

(1) See No. VII. Note (1) *post*.

(2) See No. III. Note (2) *ante*.

(3) See Decree for Administration of Legal and Equitable Assets, subject to Mortgage and Dower, No. VII. Note (2) *post*.

(4) *Direction where Assets equitable*.

This direction is sometimes confined to specialty creditors. *Plunket v. Penson*, *supra*. *Rye v. Boad*, Appendix (1). *Gibson v. Styles*, Appendix (2). *Lowthian v. Hasel*, 4 Bro. 168. *Itell v. Bean*, No. X. *post*.

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It is sometimes extended to creditors generally. *Hargrave v. Richardson*, Appendix (3). *Wride v. Clarke*, No. VII. *post.* *Davies v. Topp*, No. VI. *post.* *North v. Cox*, 3 P. W. 344. note. *Pope v. Gwyn*, 8 Ves. 29. note. And see 2 Fonbl. 399.

It does not, however, apply to judgment creditors. *Sharpe v. Earl of Scarborough*, 4 Ves. 538.

Nor to mortgagees. See decree in *Wride v. Clarke*, No. VII. *post.*

Nevertheless the personal estate will not be applied in payment of mortgagees (nor it seems of judgment creditors) in such a mode as to disappoint other creditors or legatees. See Order of Application of Assets, No. VI. note (2), *post.*

The direction is sometimes retrospective. *Plunket v. Penson*, *supra.* *Gibson v. Styles*, Appendix (2). *Wride v. Clarke*, No. VII. *post.* *Lowthian v. Hasel*, 4 Bro. 168.

Nevertheless it seems that in that case it does not apply to sums received by creditors before the filing of the bill. See *Lowthian v. Hasel*, *supra.* *Basset v. Leach*, there cited.

(5) Further Directions are not reserved. See Reservation of Further Directions. Usual Directions, XV. *ante.*

Further Directions.

In *Hartwell v. Chitters*, Ambl. 308. the Lord Chancellor said that the general direction in the decree to apply the assets in a course of administration did not confine such application to a legal course, but was to be taken distributively and understood of legal or equitable, according to the nature of the assets; and accordingly, where the original decree had directed that the assets should be applied in a course of administration, and part of the assets were held to be equitable, seems to have held that they might be applied as such on further directions. But in *Bailey v. Ekins*. 7 Ves. 324. under the like circumstances it was agreed that the direction in the original decree should be got rid of by a short petition of rehearing. And see *Solley v. Gower*, 2 Vern. 62.

APPENDIX (1).

Direction where Assets equitable.

And in case the said testator's creditors by specialty shall exhaust his personal estate, his simple contract creditors are to come in, and receive a satisfaction *pro tanto* out of his real estate, and then the

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said testator's creditors remaining unpaid are thereout to be paid *pari passu*. Rye v. Boad, M. R. 27th October, 1747. Reg. Lib. B. 1747. fol. 31.

APPENDIX (2).

Direction where Assets equitable.

And in case any of the specialty creditors of the said testator shall have exhausted any part of his personal estate, towards satisfaction of their debts, then they are not to receive any thing out of the said testator's real estates till the other creditors shall be paid up equally with them. Gibson v. Stiles, L. C. 18th July, 1741. Reg. Lib. A. 1740. fol. 550.

APPENDIX (3).

Direction where Assets equitable.

And in case any of the creditors of the said testator shall exhaust any part of his personal estate, then his Lordship doth declare they are not to receive any thing out of the said testator's real estate, charged with the payment of his debts, till the other creditors are paid up equal with them. Hargrave v. Richardson, L. C. 9th July, 1753. Reg. Lib. A. 1752. fol. 566. S. C. (Hargrave v. Tyndal), 1 Bro. 136. note.

No. V.

**DECREE FOR ADMINISTRATION OF ASSETS,
WHERE LEGACIES CHARGED ON COPYHOLD
ESTATE.**

[The testator, by his will, charged his freehold and copyhold estate with the payment of his debts and legacies. The copyhold was surrendered to the use of the will; but the will was not attested.]

[*Inter alia*] His Lordship doth declare that the plaintiffs, Peter Fenhoulhet and Jane Frances his wife, in right of the said Jane Frances, in the event that has happened, are entitled to &c. and that the same is to be considered as a debt to be satisfied out of the assets of the said Thomas Wilday, in a course of administration. And doth order and decree that it be referred to the said Master to take an account of

all the debts of the said Thomas Wilday, which were due and owing from him at his death (1), and of his funeral expenses. And it is further ordered, that the said Master do also take an account of the said Thomas Wilday's personal estate, which hath been received by, &c. [See Decree in Creditor's Suit, Personal Assets, No. I. *ante.*] And that such personal estate be applied in payment of his debts and funeral expenses in a course of administration. And in case such personal estate shall not be sufficient for payment of the said testator's debts, his Lordship doth declare that the said testator's copyhold estate (2), in the manor of Hackney, is liable to make good so much as his personal estate shall fall short to pay such debts, and also his legacies. And in that case, it is further ordered, that the said Master do take an account of his legacies, and compute interest thereon &c. [See Decree in Suit by Legatee, Personal Assets, No. IV. *ante.*] And that the said copyhold estate be sold &c. [See Usual Directions, No. VI. *ante.*] And it is further ordered, that the money arising by such sale be applied, in the first place, towards payment of so much of the said testator's debts and the interest thereof, as his personal estate shall fall short to pay; and in the next place, (3) in payment of the legacies given by his will and the interest thereof, *pari passu*. And in case the testator's personal estate, and the money arising by the said sale shall not be sufficient for that purpose, It is further ordered, that then the said Master do take an account of the rents and profits (4) of the said testator's copyhold estate, which have accrued since his decease and been received, by &c. [see Decree on Bill by Bond Creditor, No. I. *ante.*] And that what shall be coming on that account be in the next place applied towards making good such deficiency. And if all the funds before mentioned shall fall short to pay the said testator's debts by specialty, then his Lordship doth declare that the specialty creditors have a right to receive satisfaction for their demands out of the said testator's freehold estate descended to the plaintiff Jane Frances, his heir at law. And in case the specialty creditors (5) shall exhaust any part of

the said testator's personal estate towards satisfaction of their debts, his Lordship doth declare, that the simple contract creditors have a right to stand in their place, and receive a satisfaction *pro tanto* out of the said freehold estate; and that in case the debts of the simple contract creditors, who shall come in the place of such specialty creditors, shall not amount to the whole of what such specialty creditors shall exhaust out of the personal estate, then that the legatees (6) ought to stand in the place of such specialty creditors for the residue of what they shall exhaust out of the personal estate. And doth order and decree that such freehold estate, or a sufficient part thereof, be sold &c. [See Usual Directions, No. VI. *ante.*] And it is further ordered, that the money arising by such sale be applied in payment of so much of the testator's debts by specialty, or of such other of his simple contract creditors as have a right to stand in their place, according to the circurity before mentioned, as his personal estate shall fall short to satisfy *pari passu*; and afterwards, in payment of so much of his legacies as shall be remaining unpaid, according to the circuitry before mentioned *pari passu*. And for the better taking of the accounts &c. [See Usual Directions, No. II. *ante.*] And his Lordship reserved the consideration of all further directions until &c. [See Usual Directions, No. XV. *ante.*] And any of the parties were to be at liberty to apply as &c. [See Usual Directions, No. XIX. *ante.*] *Fenoulhet v. Passavant*, L.C. 11th March, 1754. Reg. Lib. A. 1753. fol. 524. S. C. 1 Dick. 253.

NOTES.

(1) See Decree in Creditors' Suit; Personal Assets, No. I. Note (1), *ante.*

(2) See Order for Administration of Assets, No. VI. Note (2), *post.*

(3) *Charge of Debts and Legacies.*

It was formerly held, that where debts and legacies were charged on real estates, the debts and legacies were to be paid *pari passu*. *Gosling v. Dorney*, 1 Vern. 482. *Anon.* 2 Vern. 133. *Davenhill v. Fletcher*, 1 Mad. Chan. 617. 4 point.

Unless where the devise being to the executors the assets were held

to be legal. *Greaves v. Powell*, 2 Vern. 248. *Anon.* 2 Vern. 405. *Walker v. Meagher*, 2 P. W. 550.

But it has long been settled, that where the assets are equitable, the debts are to be paid in the first instance. *Fenhouillet v. Passavant*, *supra*. *Davies v. Topp*, No. VI. *post*. *Kidney v. Coussmaker*, 12 Ves. 154. *Sear v. Ashwell*, 3 Swan. 413. note. *Bradgate v. Bridlington*, Mos. 56. *Maylin v. Hooper*, Ca temp. Hard. 206. *Hixon v. Witham*, 1 Ch. Ca. 248. *Walker v. Meagher*, *supra*, notes, 6th edition.

(4) See Legal Assets, No. III. Note (2) *ante*.

(5) See Direction for Marshalling, No. III. Note (4) *ante*.

(6) For marshalling for legatees. See Order of Administration of Legal and Equitable Assets, No. VI. Note (2) *post*.

No. VI.

DECREE FOR ADMINISTRATION OF LEGAL AND EQUITABLE ASSETS ACCORDING TO THEIR PRIORITIES.

[The testator was seized in fee of estates, which he mortgaged in fee (1), and devised by his will for life, charged with debts and legacies. He afterwards purchased other estates. He gave parts of his personal estate as heir-looms.]

[*Inter alia*] His Honour doth declare the will of the said testator John Topp, well proved &c. [See Establishing Will, No. I. *ante*.] And that it be referred to Mr. B. one &c. to take an account of what is due to the plaintiffs, and all other the creditors of the testator for their debts, comprising what is due to the defendant Pemberton, the mortgagee, for principal and interest on his mortgages in the pleadings mentioned, and to tax him his costs of this suit; and the said Master is also to take an account of the said testator's legacies &c. and to compute interest, &c. [See Decree in Suit by Legatee. Personal Assets, No. IV. *ante*.] And it is ordered and decreed that the said Master do also take an account of the said testator's personal estate not specifically bequeathed (2) come to the hands of &c. [See Decree in Creditors'

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Suit, Personal Assets, No. I. *ante.*] And it is ordered that the personal estate of the said testator not specifically bequeathed, be applied in payment of his debts, funeral expenses, and legacies, in a course of administration. But in case such personal estate of the said testator shall not be sufficient for payment of his debts, his Honour doth declare that the deficiency as to what shall be remaining due to the said defendant Robert Pemberton, the mortgagee, and the other specialty creditors, ought to be raised by sale or mortgage of the said testator's real estate, descended on the defendants Sarah Lloyd and Jane Price, his heirs at law, and doth order and decree that such deficiency be raised by such sale or mortgage of the said estate, or a sufficient part thereof, with the approbation of the said Master, and all proper parties are to join &c. [See Usual Directions, No. VI. *ante.*] And it is ordered that the money to arise by such sale or mortgage be applied in making good such deficiency accordingly. And in case of such deficiency, and the same shall be raised by sale of the said estate, or any part thereof, and more shall be raised than shall be sufficient for the purposes aforesaid, It is ordered that the surplus be paid into the bank, with the privy &c. [See Usual Directions No. X. *ante.*] with liberty for any person or persons interested therein to apply to the Court concerning the same. But in case such personal estate, and the money to arise by sale of the said estate descended shall not be sufficient for the purposes aforesaid, his Honour doth declare that the rents and profits (3) of the said estate ought in the next place to be applied to make good such deficiency in manner aforesaid, and doth in that case order and decree that the said Master do take an account of the rents and profits &c. [See Decree in Suit by Bond Creditor, No. I. *ante.*] And it is ordered that what shall be coming on the said account of rents and profits be applied in making good such deficiency accordingly. And in case the said defendant Robert Pemberton, the mortgagee, or the other specialty creditors of the said testator, shall have exhausted (4) any part of the said testator's personal estate, the

simple contract creditors in the first place, and the legatees in the next place, are to stand in the place of such specialty creditors, and receive a satisfaction *pro tanto*, out of the said real estate descended. But in case the funds aforesaid shall not be sufficient for payment of the said testator's debts and legacies, under and according to the directions aforesaid, his Honour doth declare that such deficiency ought to be made good out of the said testator's real estates devised by his will, charged with the payment of his debts and legacies, and doth order and decree, that such deficiency be raised thereout by sale or mortgage of the said estates, or a sufficient part thereof, with the approbation of the said Master, the said defendant Robert Pemberton, the mortgagee, by his counsel consenting to a sale (5) of that part of the said estates comprised in his mortgages in case it shall be necessary or proper to sell the same. And in case such deficiency shall be raised by sale, then such sale is to be to the best purchaser or purchasers &c. [See Usual Directions, No. VI. *ante*.] And it is ordered that the money to arise by such sale or mortgage be applied in the first place, in payment of what shall be remaining due to the said defendant Robert Pemberton, the mortgagee, for principal, interest, and costs, on his said mortgages not exceeding the value of the estates comprised in his said mortgages; and in the next place, the money to arise by such sale or mortgage be applied in payment of what shall be remaining due to the plaintiff, and all other the creditors of the said testator, *pari passu*. But such of the said creditors who shall have received any thing out of the said personal estate, and the said estate descended, are not to receive any thing out of the money to arise by sale or mortgage of the said estate devised, till the other creditors are paid up equal with them; and in the next place, (6) the several legatees are to be thereout paid their respective legacies, or what may be remaining due to them for their said legacies, equally and in proportion to their said legacies respectively. And in case the said last-mentioned deficiency shall be raised by mortgage, the defendant Richard Topp, the tenant for life of the said estates,

is to keep down the interest of such mortgage out of the rents and profits of the said devised estate. And in case the same shall be raised by sale, and more shall be raised than shall be sufficient for the purposes aforesaid, it is ordered that the surplus be paid into the bank with the privy &c. [See Usual Directions, No. X. *ante.*] with liberty for any person or persons interested therein to apply to the Court concerning the same, as they shall be advised. And it is ordered that an inventory be taken of the several specific things mentioned in the said testator's will, and thereby directed to go as heir-looms (7) with his estate at Whitton, and that two parts be made thereof, and be signed by the said defendant Richard Topp; and that one part thereof be kept by the said defendant Richard Topp, and the other part deposited with the said Master for the benefit of the persons interested therein. And it is ordered that the said specific things be considered as heir-looms, and be from time to time enjoyed by the person who shall be in possession of the said testator's estate at Whitton, so far as the same may by the rules of law and equity be so limited. And for better taking the aforesaid accounts &c. [See Usual Directions, No. II. *ante.*] And it is ordered that all parties (except the defendant Robert Pemberton the mortgagee, whose costs are hereinbefore provided for) be paid their costs of this suit to be taxed by the said Master, out of the said testator's estate, so far as the same are not paid out of his personal estate, to be raised out of his real estates, in order and manner hereinbefore directed with respect to the deficiency of the said testator's personal estate for payment of his debts. And any of the parties are to be at liberty to apply &c. (8) [See Usual Directions, No. XIX. *ante.*] *Davies v. Topp*, M. R. 25th February, 1780. Reg. Lib. A. 1779. fol. 228. S. C. 1 Bro. 525.

NOTES.

- (1) See No. VII. Note (1), *post*.
- (2) *Order of the Administration of Legal and Equitable Assets in Payment of Debts and Legacies.*

1st. The personal estate. *Davies v. Topp*. 1 Bro. 526. *Wride v. Clarke*, No. VII. *post*. *Donne v. Lewis*, 2 Bro. 263. Not specifically

bequeathed. Decree in *Davies v. Topp, supra.* *Harmood v. Oglander*, 8 Ves. 124. Or exonerated, *Manning v. Spooner*, 3 Ves. 117.

This being legal assets, is to be applied in a course of administration, in the payment of debts, according to their legal priorities, and then in payment of legacies. Decree in *Davies v. Topp, supra.*

2nd. Real estates specifically appropriated to (not merely charged with) the payment of debts. *Davies v. Topp, supra.* *Harmood v. Oglander, supra.* *Manning v. Spooner, supra.* *Donne v. Lewis, supra.* *Powis v. Corbet*, 3 Atk. 556. But see *Fenoulhet v. Passavant*, No. IV. *ante.* in which estates charged were applied before estates descended.

In *Milnes v. Slater*, 8 Ves. 303. the Lord Chancellor intimates a doubt of Lord Redesdale, whether the law had been well collected in these cases; but nevertheless considered the rule to be settled.

These being equitable assets are to be applied in the payment of debts *pari passu.* *Haslewood v. Pope*, 3 P. W. 323. *Deg v. Deg*, 2 P. W. 416. Contra. *Car v. Countess of Burlington*, 1 P. W. 228. And in case creditors are paid out of the personal estate, in payment of legatees *pro tanto.* *Haslewood v. Pope, supra.* Whether specific or pecuniary. S. C.

3d. Real estates descended. *Davies v. Topp, supra.* *Wride v. Clarke*, No. VII. *post.* *Harmood v. Oglander, supra.* *Manning v. Spooner, supra.* *Donne v. Lewis, supra.* *Powis v. Corbet, supra.* Whether possessed by the devisor at the date of the will or subsequently acquired. *Manning v. Spooner, supra.* *Milnes v. Slater*, 8 Ves. 304.

These being legal assets as to specialty creditors are to be applied in payment of specialty creditors in a course of administration; and in case the specialty creditors are paid out of the personal estate, by marshalling, in payment of simple contract creditors *pro tanto.* Decree in *Davies v. Topp, supra.* *Fenoulhet v. Passavant*, No. V. *ante.* *Davenhill v. Fletcher*, 1 Mad. Chancery, 617. 1st point. And then in payment of legatees *pari passu.* Decree in *Davies v. Topp, supra.* *Fenoulhet v. Passavant*, No. V. *ante.* *Davenhill v. Fletcher, supra.* *Hamly v. Fisher*, 1 Dick. 105. S. C. (*Hanby v. Roberts*) Ambl. 128. *Scott v. Scott*, Ambl. 383. S. C. 1 Eden, 458. *Clifton v. Burt*, 1 P. W. 678. Whether specific or pecuniary. *Tipping v. Tipping*, 1 P. W. 730. *Burton v. Pierpoint*, 2 P. W. 81.

4th. Real estates devised charged with the payment of debts.

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Davies v. Topp, *supra*. Wride v. Clarke, No. VII. *post*. Harmood v. Oglander, *supra*. Manning v. Spooner, *supra*. Donne v. Lewis, *supra*. Powis v. Corbet, *supra*. And see Barnewell v. Lord Cawdor, 3 Mad. 453.

These being equitable assets are to be applied in payment of debts *pari passu*. Decree in Davies v. Topp, *supra*. Haslewood v. Pope, *supra*. Deg. v. Deg, *supra*. And in case the creditors are paid out of the personal estate, in payment of legatees *pro tanto*. Hamly v. Fisher, *supra*, as reported in Dickens. Haslewood v. Pope, *supra*. Burton v. Pierpoint, *supra*. Davenhill v. Fletcher, *supra*. And see Ironmonger v. Lassells, 1 West, 145. But see Hamly v. Fisher, *supra*, as reported in Ambler. Kightley v. Kightley, 2 Ves. jun. 328. Keeling v. Brown, 5 Ves. 359. Austen v. Halsey, 6 Ves. 475. Bootle v. Blundell, 1 Mer. 233. *A fortiori* where legacies as well as debts are charged on the devised estates. Decree in Davies v. Topp, *supra*.

5th. Real estates devised not charged with debts. See Davies v. Topp, *supra*. Donne v. Lewis, *supra*. Manning v. Spooner, *supra*.

These being legal assets as to specialty creditors are to be applied in payment of specialty creditors, jointly with the personal estate specifically bequeathed. Long v. Short, 1 P. W. 403. And see Silk v. Pryme, 1 Dick. 384. S.C. 1 Bro. 138. note. And in case the specialty creditors are paid out of the personal estate, in payment of simple contract creditors. Davenhill v. Fletcher, *supra*. But not in payment of legatees. S.C. Herne v. Meyrick, 1 P. W. 201. Clifton v. Burt, 1 P. W. 678. Haslewood v. Pope, *supra*. Hamly v. Fisher, *supra*. Forrester v. Lord Leigh, Ambl. 172. Scott v. Scott, *supra*. And see Keeling v. Brown, *supra*.

Assets are applied in the like order in the payment of mortgages, as of specialty debts. Decree in Davies v. Topp, *supra*. Wride v. Clarke, No. VII. *post*. Bartholomew v. May, 1 Atk. 487. S. C. 1 West, 255. Galton v. Hancock, 2 Atk. 424. Marquis of Tweeddale v. Earl of Coventry, 1 Bro. 240. Howell v. Price, 1 P. W. 291.

And this, though the mortgaged estate is expressly devised, subject to the incumbrances upon it. Serle v. St. Eloy, 2 P. W. 386. Barnewell v. Lord Cawdor, 3 Mad. 453.

But the personal estate will not be applied in the payment of mortgagees, so as to defeat other creditors. Bartholomew v. May, *supra*. Aldrich v. Cooper, 8 Ves. 382. Or legatees, whether specific

or pecuniary. *O'Neal v. Mead*, 1 P. W. 693. *Davis v. Gardiner*, 2 P. W. 190. *Rider v. Wager*, 2 P. W. 335.

Where both devised and mortgaged estates are charged with the payment of debts, each is to contribute to the mortgage. *Carter v. Barnardiston*, 1 P. W. 505.

Where mortgages were expressly directed not to be discharged out of personal estate, but to remain charged upon the estates till discharged by the devisees, who were tenants for life, it was held that the rents and profits must be applied in discharge of the mortgages, in exoneration of descended estates, and of personal estate, even in favour of next of kin, if undisposed of. *Milnes v. Slater*, 8 Ves. 295.

That the above rules apply to those debts for the payment of which the personal estate is the primary fund, and the real estate auxiliary only; not to those for the payment of which the real estate is the primary fund. See *Evelyn v. Evelyn*, 2 P. W. 664.

(3) See Decree in Suit by Bond Creditor, No. III. Note (2), *ante*.

(4) See Directions for marshalling Assets, No. III. Note (4), *ante*.

(5) See *Wride v. Clarke*, No. VII. Note (2), *post*.

(6) See *Fenoulhet v. Passavant*, No. V. Note (3), *ante*.

(7) *Heir Looms.*

Where goods are given to a person for life only, the old rule of the Court was, that such person should give security that they should not be embezzled. *Bill v. Kinaston*, 2 Atk. 82. *Bracken v. Bentley*, 1 Ch. Rep. 110. But the method now is, for an inventory to be signed by the devisee for life, and to be deposited with the Master for the benefit of all parties. *Davies v. Topp*, *supra*. *Bill v. Kinaston*, *supra*. And see *Leeke v. Bennett*, 1 Atk. 471. *Richards v. Baker*, 2 Atk. 321. *Foley v. Burnell*, 1 Bro. 279.

Where however the property is in danger, security will be required. See *Foley v. Burnell*, *supra*. Or a receiver will be appointed. *Earl of Shaftesbury v. D. of Marlborough*. Decrees &c. respecting Receivers, No. VIII. *post*.

(8) Further directions are not reserved. See Reservation of further Directions, No. XV. *ante*.

No. VII.

DECREE FOR ADMINISTRATION OF LEGAL AND EQUITABLE ASSETS, SUBJECT TO MORTGAGES AND DOWER.

[The testator was seised in fee of estates, which he mortgaged for terms, and by his will charged with debts. He afterwards purchased other estates, which he also mortgaged for terms. (1)]

His Honour doth declare the will of the said testator, John Clarke to be well proved &c. [See Establishing Will, No. I. *ante.*] And it is further ordered, that it be referred to Mr. E. one &c. to take an account of what is due to the plaintiffs for principal and interest on their respective bonds, and likewise what is due to the defendants the mortgagees for principal and interest on their several mortgages, and to tax them their costs of this suit, and also take an account of all other the said testator's debts &c. [See Decree in Creditor's suit. Personal Assets, No. I. *ante.*] And it is ordered, that the said testator's personal estate be applied in payment of his debts and funeral expenses in a course of administration. And by consent of the defendants Ann Painblanc, Robert Lambert, John Reader and William Iveson the mortgagees (2), his Honour doth order and decree, that the said testator's freehold estate purchased after the time of making his will be sold &c. [See Usual Directions, No. VI. *ante.*] But such sale is to be subject to the said defendant Rosamond Clarke the widow's right of dower in the said estate, unless she shall come in before the said Master and consent to have a value set on her dower from the time of the said sale; and in such case the said Master is to set a value thereon accordingly; and it is ordered that she be paid such value out of the money to arise by the said sale. And in case the said estate shall be sold entire, it is ordered that the said Master distinguish (3) the money which shall arise by sale of such part thereof as is comprised in the said defendant John Reader's mortgage; and it is further ordered

that the residue of the money which shall arise by sale of the premises comprised in the said mortgage be applied to satisfy what the said Master shall certify to remain due to the said defendant John Reader for principal, interest and costs on his mortgage beyond what he shall receive out of the personal estate. And it is ordered that the residue of the money which shall arise by the said sale, be applied in satisfying what shall remain due for principal, interest and costs to the other defendants the mortgagees, and all other the said testator's creditors by specialty (1). And if the money which shall arise by sale of the estate comprised in the said defendant John Reader's mortgage shall not be sufficient to satisfy what shall remain due to him for principal, interest and costs on his mortgage, then it is ordered that he be considered as a creditor by specialty for the deficiency, and receive a satisfaction for the same accordingly with the said testator's other specialty creditors (4). And it is further ordered, that the said Master do also take an account of the rents and profits (5) of the said freehold estate, accrued since his decease, received by the defendant George Iveson, or by any other person by his order or for his use. And it is ordered, that the balance of that account be divided into three equal parts, and that one-third part thereof be paid to the said defendant Rosamond Clarke the widow of the said testator, for her dower; and if the said testator's personal estate and money to arise by sale of the said freehold estate shall not be sufficient to satisfy all the said testator's debts and his funeral expenses, it is ordered, that the other two-thirds of the said rents and profits be applied towards satisfaction of what shall remain due to the said testator's creditors by specialty. And if the creditors by specialty (6) shall exhaust any part of the said testator's personal estate towards satisfaction of their demands, it is ordered, that the simple contract creditors do stand in their place and receive a satisfaction *pro tanto* out of the money to arise by sale of the said testator's said freehold estate, directed to be sold as aforesaid, and the said two third parts of the rents and profits thereof, after the specialty creditors shall be fully satisfied.

And if there shall be any surplus of the money to be raised by the sale of the said freehold estate, and of the two third parts of the rents and profits thereof after payment of all the said testator's debts by specialty, and also of his debts by simple contract, so far as the simple contract creditors have a right to stand in the place of the specialty creditors, and to receive a satisfaction thereout as aforesaid, it is further ordered, that the same be paid into the bank in the name and with the privity &c. [See Usual Directions, No. X. *ante*]. And it is ordered that the said defendants George Iveson, and Ann his wife, the heir at law of the said testator, be at liberty to apply to the Court concerning such surplus as they shall be advised. But if the several funds before mentioned shall not be sufficient for the purposes aforesaid, and there shall after an application thereof in manner before directed be any thing remaining due to any of the said testator's creditors, it is further ordered, that the said Master do also take an account of the several sums of money raised by the said defendant Rosamond Clarke, the widow and devisee of the said testator, by sale of any part of the said testator's freehold estate, which he was seised of at the time of making his will; and by consent of the defendants the mortgagees on that estate (2). His Honour doth order and decree, that the remainder of the said estate be sold &c. [See Usual Directions, No. VI. *ante*.] But such sale is to be subject to the said defendant Rosamond Clarke the widow's right of dower therein, unless she shall come in before the said Master and consent to have a value set on her dower, and in such case, it is ordered, that the said Master do set a value thereon accordingly. And if the said Master shall find that such parts of the said estates as have been already sold by the said defendant the widow, were sold by her freed and discharged of her dower, it is ordered, that the said Master do set a value on her dower in such estates, and it is further ordered, that she be paid and allowed out of the money raised by her, and to be raised by the said sale hereby directed what the said Master shall find to be the value of her dower as aforesaid. And it is ordered, that the

said Master do distinguish (3) the money which has and shall arise by the sale of such parts of the said estates as are comprised in each of the mortgages on that estate. And it is further ordered, that the money which has arisen and shall arise by the sales of the premises comprised in each of the mortgages be applied to satisfy what shall remain due for principal, interest and costs on such mortgages respectively, and in the next place in satisfaction of the said testator's other debts remaining unsatisfied *pari passu* (1). But such creditors as shall have received anything out of the funds before-mentioned are not to receive anything thereout till the other creditors shall have received up equal with them, (except the mortgagees with respect to the premises comprised in their mortgages respectively). And in case the funds before-mentioned shall not be sufficient to satisfy the said testator's debts, in manner before directed, it is further ordered, that the said Master do also take an account of the rents (5) and profits of the said testator's freehold estate, which he was seised of at the time of making his will received by the said defendant Rosamond Clarke, or by any other person by her order, or for her use ; and it is ordered, that the balance of that account be divided into three equal parts, and that one-third part thereof be retained by, or allowed to the said defendant Rosamond Clarke for her dower, and that the other two-thirds be applied to make good the said deficiency in manner before-mentioned, with respect to the money arisen, or to arise by sale of that estate. And if there shall be any surplus of the money already raised and to be raised by sale of the freehold estate of which the said testator was seised at the time of making his will after such application thereof afore-said, it is ordered, that the same be paid to or retained by the said defendant Rosamond Clarke, the widow and devisee of the said testator. And if the several funds before-mentioned shall not be sufficient to satisfy the said testator's debts, then his Honour doth reserve the consideration how far the said testator's creditors may be entitled to have the deficiency made good out of the said testator's copyhold estate which he

Decrees respecting Real Assets.

was entitled to at the time of making his will, subject to the said defendant Rosamond Clarke the widow's free bench or life estate therein. And for the better taking the accounts &c. [See Usual Directions, No. II. *ante.*] And it is further ordered that the said Master do tax all parties (except the said defendants the mortgagees, whose costs are before provided for,) their costs of this suit to this time; and it is ordered, that such costs be paid out of the said testator's estate. And his Honour doth reserve the consideration of subsequent costs (7) until after the said Master shall have made his report. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Wride v. Clarke*, M. R. 1st July, 1766. Reg. Lib. B. 1765. fol. 464. S. C. 2 Bro. 261. note. 1 Dick. 382.

For orders for payment to mortgagee out of produce of sale. See Hand's Pract. 198, 199.

NOTES.

(1) *Equity of Redemption Assets.*

At law an equity of redemption, whether of a freehold or leasehold estate, cannot be taken in execution. *Plunket v. Penson*, 2 Atk. 290. *Burden v. Kennedy*, 3 Atk. 739. *Lyster v. Dolland*, 1 Ves. jun. 431. S. C. 3 Bro. 478. And see *Scott v. Scholey*, 8 E. R. 467.

The equity of redemption of a leasehold estate has been held to be equitable assets. *Case of the creditors of Sir Charles Cox*, 3 P. W. 341. *Hartwell v. Chitters*, Ambl. 308. But in *Sharpe v. Earl of Scarborough*, 4 Ves. 541. these cases are said by the Solicitor-General, *arguendo*, to have been considered as overruled, and that the equity of redemption of a leasehold is clearly assets at law. In *Clay v. Willis*, 1 B. & C. 372. however, these cases were relied on by Bailey J. as one ground of his judgment. But the mortgage in that case was not of a leasehold, and the assets were clearly equitable on the other ground relied on in the judgment.

The equity of redemption of a mortgage for a term by one seized in fee is legal assets. *Wride v. Clarke*, *supra*. *Plunket v. Penson*, 2 Atk. 291. 4. *Lord Massam v. Harding* there cited. And see *Cole v. Warden*, 1 Vern. 410.

The equity of redemption of a mortgage in fee is equitable assets,

inasmuch as it can only be got at through the medium of a court of equity. *Plunket v. Penson, supra.* Lord Massam v. Harding, *supra.* But is legal assets, inasmuch as it is only applicable to the payment of specialty and judgment creditors. *Plucknett v. Kirk*, 1 Vern. 411. *Solley v. Gower*, 2 Vern. 61. But see *Deg v. Deg*, 2 P. W. 416.

The equity of redemption of a mortgage in fee, charged with debts, is equitable assets. *Davies v. Topp*, No. VI. *ante.* *Pope v. Gwyn*, 8 Ves. 28. note. *Clay v. Willis*, 1 B. & C. 371. So of a mortgage for a term by one seized in fee. *Wride v. Clarke, supra.* Except as to judgment creditors. *Sharpe v. Earl Scarborough*, 4 Ves. 538.

The equity of redemption of a mortgage in fee of a trust estate is equitable assets. *Plunket v. Penson*, 2 Atk. 290.

(2) If the mortgagees do not consent, a sale will be directed, subject to the mortgages. See *Stuart v. Tichborne*, No. XIII. *post.*

(3) See Direction, where part only of estate included in mortgage, *Birkhead v. Manaton*, Appendix (1).

(4) See Decree for Sale on Bill by Mortgage. Decrees respecting Mortgages, No. XIII. *post.*

(5) See Decree in Suit by Bond Creditor, No. III. Note (2), *ante.*

(6) See Direction for Marshalling Assets, No. III. Note (4), *ante.*

(7) Further Directions are not Reserved. See Reservation of Further Directions. Usual Directions, No. XV. *ante.*

APPENDIX (1).

Direction where part only of Estates included in Mortgages.

But if the said Master shall find that any part or parts of the said premises are included in, or affected by some of the said mortgages and incumbrances, and not included in or affected by others of them, then the monies respectively arising by the sale thereof are to be applied to the payment of the principal and interest that shall be found to be due on such particular mortgages and incumbrances. And in case any such lands shall be sold, together with any other part of the said estates, then the said Master is to settle the proportions of the purchase money arising by the sale of such of the premises included in, or affected by, such particular mortgages and

incumbrances ; and the monies arising by the sale of the other premises, not included in or affected thereby, regard being had to the money for which the whole estate shall be sold. *Birkhead v. Manaton*, L. C. 25th January, 1748. Reg. Lib. A. 1748. fol. 308. S. C. 2 Ves. 571.

No. VIII.

DECREE TO SECURE ANNUITY OUT OF REAL ASSETS.

[Upon the plaintiff's marriage her father executed a bond to her husband, conditioned for the payment of an annuity of 30*l.*, by half-yearly payments, during the lives of the plaintiff's father and mother and the survivor of them ; and after the death of the plaintiff and her husband and the survivor of them to the children of the marriage. The plaintiff's father died, having devised his real estates to the defendant, charged with his debts, and appointed her executrix. The bill was filed for payment of the annuity.]

His Lordship doth order and decree that it be referred to Mr. A. one &c. to take an account of what is due to the plaintiff, for the arrears of the said annuity of 30*l.* annually secured by the said bond, dated the said 18th day of October, 1735, and compute interest (1) on each respective half-yearly payment, from the end of six months after the same respectively became due, at the rate of 4 per cent. per annum ; and for the better clearing of which account both sides are to produce &c. [See Usual Directions, No. II. *ante.*] And the defendant having by her answer admitted that the personal and real estate of her father, together, is more than sufficient to answer the said annuity, it is further ordered, that the defendant do pay unto the plaintiff what shall be found due for the arrears of the said annuity and interest, at such time and place as the said Master shall appoint (2), and continue to pay to the plaintiff the growing payments (3) of the said annuity as they shall become due, half-yearly ; and in case the defendant shall not pay what shall be found due for the arrears of the said annuity and interest as aforesaid, then the plaintiff is to be at liberty to apply to the Court for a sale of a sufficient

part of the real estate in question. And it is further ordered, that the said Master do see a sufficient part of the said real estate set apart for securing (4) the growing payments of the said annuity to the plaintiff during her mother's life. And it is further ordered, that the defendant do execute to the plaintiff a proper conveyance of the estate, or grant thereout, for securing the growing payments of the said annuity annually, with the approbation of the said Master. And it is further ordered, that the defendant do pay unto the plaintiff her costs of this suit to this time to be taxed by the said Master. But his Lordship doth reserve the consideration of subsequent costs until after the said Master shall have made his report; and either side is to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Newman v. Ayling*, L. C. 9th November. 1747. Reg. Lib, B. 1747. fol. 46. S. C. (*Newman v. Auling*,) 3 Atk. 579.

For minutes of same decree. See 2 Newl. Pract. 324.

For direction for securing annuities charged on personal estate. See Decree in Suit by Legatee, Personal Assets, No. IV. Note (4), *ante.*

NOTES.

(1) *Interest on Arrears.*

In *Drapers' Company v. Davis*, 2 Atk. 211. it is said by Lord Hardwicke, that *Ferrers v. Ferrers*, Ca. Temp. Talbot, 2. was the first instance of giving interest upon the arrears of an annuity. And see what is said by him of this case in *Robinson v. Cumming*, 2 Atk. 411. But in a case before Lord Macclesfield interest was allowed. *Litton v. Litton*, 1 P. W. 541. And in *Ferrers v. Ferrers*, *supra*, interest was refused.

Formerly interest was allowed upon the arrears of an annuity, when secured by a bond with a penalty. See *Newman v. Ayling*, *supra*. Or where given for maintenance. See S. C. *Litton v. Litton*, *supra*. *Drapers' Company v. Davis*, *supra*. Or where there were great arrears. *Batten v. Earnley*, 2 P. W. 163. Or where there had been obstinate delay of payment. *Stapleton v. Conway*, 1 Ves. 428. Or where the annuitant had been compelled by the delay to borrow at interest. *Anon.* 2 Ves. 661. S. C. *Signal v. Brereton*,

1 Dick. 278. And interest has been given from the day the payment became due. *Litton v. Litton, supra.* Or from the day when the next subsequent payment became due, S.C. and Newman v. Ayling, *supra.* Or from the Master's report. *Drapers' Company v. Davis, supra.* But the allowance of it was held to be discretionary. *Morris v. Dillingham, 2 Ves. 170.* *Drapers' Company v. Davis, supra.* And in later cases interest has been refused, notwithstanding such circumstances. *Tew v. Earl of Winterton, 3 Bro. 489. S.C. 1 Ves. jun. 451.* *Anderson v. Dwyer, 1 Sch. & Lefr. 301.* And notwithstanding that the arrears have been liquidated by the report. *Creuze v. Lowth, 4 Bro. 157. 316. S.C. Creuze v. Hunter, 2 Ves. jun. 157.* *Bedford v. Coke, 1 Dick. 178.* *Signal v. Brereton, supra.* And see *Mellish v. Mellish, 14 Ves. 516.*

But where the grantor is obliged to come into equity, interest will be allowed. See *Robinson v. Cumming, supra.* *Ferrers v. Ferrers, supra.*

So where the grantee has been restrained by injunction from enforcing his legal remedies. *O'Donel v. Brown, 1 Ba. & Be. 262.* *Morgan v. Morgan, 2 Dick. 643.*

(2) See Direction for Payment. Usual Directions, No. VIII. *ante.*

(3) *Growing Payments.*

At law the judgment on a writ of annuity is for the recovery of the annuity, and the arrearages, as well before the bringing of the action as afterwards, up to the time of the judgment. See *Tidd's Pract. 938.* And under this judgment arrears subsequent to the judgment may be recovered. *Ib. 1141.*

So in equity the decree extends to future payments. *Newman v. Ayling, supra.* And see *Cooke v. Wiggins, 10 Ves. 191.*

(4) *Security.*

In a suit by the grantee against assets, future payments will be directed to be secured. *Newland v. Ayling, supra.*

But not in a suit against the grantor. *Cooke v. Wiggins, 10 Ves. 191.*

No. IX.

DECREE FOR EXECUTION OF TRUSTS OF WILL, WHERE PERSONAL ESTATE EXONERATED.

[The testator devised his estates to the plaintiff Dorothy, the wife of the plaintiff Lord, for life, with remainder to the defendant the infant in tail, subject to a term of 500 years, which he charged with his debts and legacies, in exoneration of his personal estate.]

His Lordship declared, that the said testator's will being admitted by the plaintiff Dorothy, the testator's heir at law, ought to be established &c. [See Establishing Will, No. II. *ante.*] And it is ordered that it be referred to Mr. S. one &c. to take an account of the said testator's debts (1), funeral expenses and legacies, and that the specific legacies (2) given by the said testator's will be delivered by the defendant the executrix, according to the said testator's will. And the defendant the executrix admitting the testator's personal estate to be sufficient to answer the further purposes in the said will, viz., to pay the funeral expenses and the charges of the probate of the testator's will, his Lordship declared, that the residue of the said testator's personal estate doth belong to the defendant the executrix, freed from the payment of the said testator's debts and legacies. And it is ordered, that the said Master do take an account of the rents and profits of the said testator's real estates, devised by his will and comprised in the term of 500 years, accrued since the said testator's death, which have been received by the plaintiff, or by any other person for her use or by her order, and thereout the plaintiff is to keep down the interest of the said testator's debts and legacies. And as to the principal of the testator's debts and legacies, it is ordered, that the same be raised by mortgage of the said testator's real estate, devised by his said will and comprised in the said term of 500 years, or a sufficient part thereof, with the approbation of the said Master, wherein all parties are to join &c. [See Usual Directions, No. VI. *ante.*] And the money to be raised by

such mortgage is to be applied, in the first place, in payment of the said testator's debts, and then of his legacies. And it is ordered, that the devisee for life of the said real estates do keep down the interest of such mortgage money during her life ; and in case there shall be any default in her in keeping down the said interest, the defendant the infant is to be at liberty to apply to the Court touching the same. And in taking the aforesaid accounts &c. [See Usual Directions, No. II. *ante.*] And all parties are to have their costs of this suit to be taxed by the Master out of the said testator's real estate, and to be raised thereout by mortgage, in manner before directed. And the parties are to be at liberty to apply (3) &c. [See Usual Directions, No. XIX. *ante.*] Lord v. Calton, L. C. 10th November, 1747. Reg. Lib. B. 1747. fol. 107.

NOTES.

(1) *Interest.*

No directions are given as to interest, *sed qu.*?

It was formerly held, that in the case of a trust, whether by deed or will for payment of debts, simple contract debts should carry interest. *Car v. Countess of Burlington*, 1 P. W. 229. *Maxwell v. Wettenhall*, 2 P. W. 27. But this was overruled by Lord Hardwicke. *Barwell v. Parker*, 2 Ves. 363. And see *Lloyd v. Williams*, 2 Atk. 110. *Earl of Bath v. Earl of Bradford*, 2 Ves. 588. And it is so held, notwithstanding a provision by will for payment of debts generally and interest. *Tait v. Lord Northwick*, 4 Ves. 816.

So a trust for payment of debts contained in a schedule, with interest generally, was held to be confined to debts carrying interest. *Hamilton v. Houghton*, 2 Bligh. 169. And see *Shirley v. Earl Ferrers*, 1 Bro. 41.

But a charge by will of the simple contract debts of another, upon real estates, was held to be in the nature of a legacy, and to carry interest from the death of the testator. *Shirt v. Westby*, 16 Ves. 393.

(2) See Decree in Suit by Legatee. Personal Assets, No. IV. Note (1), *ante.*

(3) Further directions are not reserved. See Reservation of Further Directions, Usual Directions, No. XV. *ante.*

No. X.

**DECREE FOR ADMINISTRATION OF ASSETS—
SURRENDER OF COPYHOLD SUPPLIED.**

[The testator by his will charged his freehold estates with the payment of his debts. He had no freehold estates, but had copyhold estates, which he had not surrendered to the use of his will.]

[*Inter alia*] The will of the said testator, Thomas Bean, being admitted by the defendant, Thomas Bean, his heir at law, his Lordship doth declare that it ought to be established &c. [See Establishing Will, No. II. *ante.*] And that it be referred to the said Master to take an account of the debts due from the said testator to the plaintiffs and to any other of the creditors &c. And it is further ordered, that the said Master do likewise take an account of the personal estate of the said testator &c. [See Decree in Creditor's Suit, Personal Assets, No. I. *ante.*] And that such personal estate be applied in payment of the said testator's debts &c. in a course of administration. And it being admitted that the said testator was not seised of any freehold estate, his Lordship doth declare that his copyhold estate passes by his will, and that the plaintiffs are entitled to have the want of a surrender thereof, to the use of his will supplied. And it is further ordered, that the said copyhold estate be sold, with the approbation &c. [See Usual Directions, No. VI. *ante.*] And that the said defendant, Thomas Bean, the said testator's heir at law, and all other proper parties do join &c. And it is further ordered, that the said Master do take an account of the rents and profits (1) of the said copyhold estate which have been received by the said defendant, Thomas Bean, or by &c. [See Decree in Suit by Bond Creditor, No. III. *ante.*] And that the money arising by such sale be applied in the first place in the payment of &c. And that the residue of the money arising by such sale, together with the said rents and profits, be applied in payment of such of the said testator's debts as his personal estate will not extend to satisfy, *pari passu*. And in case any

of the said testator's creditors by specialty (2) shall exhaust any part of his personal estate, then they are to receive nothing out of the said rents and profits and money arising by such sale till the simple contract creditors are paid up equal with them. And for the better clearing of the several accounts before directed &c. [See Usual Directions, No. II. *ante.*] And it is further ordered, that the plaintiffs be paid their costs of this suit to this time, together with &c. to be taxed by the said Master out of the said testator's estate. And his Lordship doth reserve the consideration of subsequent costs as between &c. until after &c. [See Usual Directions, No. XVII. *ante.*] And any of the parties are to be at liberty to apply &c. (3) [See Usual Directions, No. XIX. *ante.*] *Ithell v. Bean*, L. C. 28th February, 1749. Reg. Lib. A. 1748. fol. 708. S. C. 1 Dick. 132. 1 Ves. 215. See stat. 55 Geo. 3. c. 192.

NOTES.

(1) The Court does not confine itself to supplying the want of a surrender, but will direct an account of rents and profits. *Kidney v Coussmaker*, 12 Ves. 158.

(2) See Direction where Assets Equitable, Real Assets, No. IV. Note (4), *ante.*

(3) Further directions are not reserved. See Reservation of Further Directions, Usual Directions, No. XV. *ante.*

No. XI.

**DECREE FOR ADMINISTRATION OF ASSETS.
—DEFECT IN EXECUTION OF POWER SUPPLIED.**

[The husband and wife had a power to charge the settled estates with 3000*l.* If raised in part only, the survivor had a power by will duly executed to charge the estates with the residue in favour of the creditors of either. They made a mortgage for 800*l.* to the defendant Ogle ; and the wife, who survived by will, charged the settled estates with the debts of herself and her husband ; but the will was not duly executed.]

[*Inter alia*] His Lordship doth order and decree, that it be referred to Mr. M. one &c. to take an account of what is

due to the defendant Ogle for principal and interest on his mortgage, and to tax him his costs of this suit; and also to take an account of what is due to the plaintiffs for their several debts, from the said Robert Rodham and Sarah his wife, or either of them, and to compute interest &c. And it is further ordered, that the said Master do likewise take an account of the personal estate of the said Robert Rodham, &c. [see Decree in Creditor's Suit, Personal Assets, No. I. *ante*,] and that such personal estate be applied in payment of the debts of the said Robert Rodham in a course of administration. And it is further ordered, that the said Master do likewise take an account of the personal estate of the said Sarah Rodham &c. [see Decree in Creditor's Suit, Personal Assets, No. I. *ante*,] and that such personal estate of the said Sarah Rodham be applied in payment of her debts in a course of administration. And in case the personal estate of the said Robert Rodham shall not be sufficient to answer all his debts, or the personal estate of the said Sarah Rodham shall not be sufficient to answer all her debts, then his Lordship doth declare that so much as shall be sufficient to answer what shall be found due for principal, interest, and costs on the said mortgage, and the debts of the said Robert Rodham and Sarah Rodham, which shall not be satisfied by their respective personal estates, is to be considered as a charge on the said real estate, to the extent of and not exceeding the sum of 3000*l.*, with interest for the same, at the rate of 4*l.* per cent. per annum, from the death of the said Sarah Rodham. And his Lordship doth declare, that the will of the said Sarah Rodham being made only by virtue of and in execution of the power contained in the said settlement, dated the 16th day of May, 1744, and such power having been executed for the payment of debts, the defect in the number of witnesses thereto ought to be supplied and aided in this Court. And the defendant Ogle submitting (1) to a sale, it is further ordered and decreed, that so much money as shall be sufficient to pay the principal, interest, and costs, that shall be reported due on the said mortgage, and such of

the debts of the said Robert Rodham and Sarah his wife, or either of them, as the personal estates of the said Robert Rodham and Sarah his wife respectively shall not be sufficient to answer, not exceeding the said sum of 3000*l.* and interest, be raised with the said Master's approbation by sale of the said real estate, or a sufficient part thereof. And for that purpose it is further ordered and decreed, that a sufficient part of the said real estate, comprised in the said settlement of the 16th day of May, 1744, be sold &c. [See Usual Directions, No. VI. *ante*]; and that the money arising by such sale be applied, in the first place, to pay the defendant Ogle his principal, interest, and costs as aforesaid, and then in satisfaction of so much of the debts of the said Robert Rodham and Sarah Rodham respectively, as their personal estates shall not extend to satisfy. And for the better taking of the said accounts &c. [See Usual Directions, No. II. *ante*.] And all parties to whom costs are not hereinbefore given are to be paid their costs in this suit to this time, to be taxed by the said Master out of the said estate, to be raised in like manner. And his Lordship doth reserve the consideration of subsequent costs till after &c. [See Usual Directions, No. XVII. *ante*.] And any of the parties are to be at liberty to apply (2) &c. [See Usual Directions, No. XIX. *ante*.] *Wilkie v. Home*, L. C. 20th April, 1752. Reg. Lib. B. 1751. fol. 616. S. C. 1 Dick. 165. See Sugden on Powers, 361.

NOTES.

(1) See Decree for Administration of Legal and Equitable Assets, Subject to Mortgages &c. No. VII. Note (2), *ante*.

(2) Further directions are not reserved. See Reservation of Further Directions, Usual Directions, No. XV. *ante*.

No. XII.

DECREE FOR RAISING PORTIONS AND PAYING OFF INCUMBRANCES BY MORTGAGE OR SALE OF TERM.

[The plaintiff, Lord Viscount Fane, was tenant for life of the settled estates. The portions were directed to be paid with interest at 5*l.* per cent. from the death of the testator. The 25,000*l.* was charged by the testator with the portions, and with mortgages and incumbrances generally, and the surplus was given to his executor.]

His Lordship declared the will and codicil of the said Charles Lord Viscount Fane, deceased, to be well proved &c. [See Establishing Will, No. I. *ante.*] And it is hereby referred to Mr. H. one &c. to compute interest on the respective portions of 4400*l.* directed by the said will and codicil to be paid to his daughters the plaintiffs, Elizabeth and Charlotte, at the rate of 5*l.* per cent. from the death of the said Charles Lord Viscount Fane. And the said Master is likewise to inquire what mortgages or incumbrances were subsisting upon the real estate of the said Lord Viscount Fane in Great Britain and Ireland at the time of his death, and take an account of what is due for principal and interest upon such mortgages and other incumbrances. And what shall be found due for interest upon the said portions is to be paid and kept down by the plaintiff Lord Viscount Fane out of the rents and profits of the settled estate, and what shall be found due for interest upon the said mortgages and incumbrances which has accrued since the death of the said late Lord Viscount Fane is to be also kept down and paid to the several persons entitled thereto by the plaintiff Lord Viscount Fane out of the rents and profits of the said estate. And it is ordered that the sum of 25,000*l.* sterling, appointed by the said will to be raised out of the settled estate by virtue of the power in the settlement of the 17th and 18th days of April, 1739, be raised by mortgage or sale of the said settled estate, or a

sufficient part thereof, for the term of 500 years created by the said will as the said Master shall direct, and in case the said Master shall direct the same to be raised by sale, then it is ordered that such sale be made with the approbation &c. [See Usual Directions, No. VI. *ante.*] And in case the said Master shall direct the same to be raised by a mortgage, then it is ordered that such mortgage be made with the approbation of the said Master, and that the said plaintiff, the Lord Fane, shall pay and keep down the interest of such mortgage money during his life, and all deeds and writings in the custody or power of any of the parties relating to the said settled estate, are to be produced &c. [See Usual Directions, No. VI. *ante.*] And all proper parties are to join in such sale or mortgage as the said Master shall direct. And the money arising by such mortgage or sale is to be applied in the first place towards payment of the said two principal sums of 4400*l.* and 4400*l.* to the said plaintiffs Elizabeth and Charlotte respectively, for their portions, and in the next place in payment of what shall be found due for principal money upon any mortgages and incumbrances which were subsisting upon the said settled estate at the time of the death of the said Lord Viscount Fane, and such interest, if any, as was due and in arrear upon any such mortgages and incumbrances at the time of his death. And in case the said plaintiff Lord Viscount Fane, has paid any part of such principal or of the interest accrued before the death of the said late Lord Viscount Fane, upon any such mortgages and incumbrances, then the said plaintiff is to stand in the place⁽¹⁾ of such mortgagees or incumbrancers, to receive satisfaction for so much as he has paid, and the residue of the money raised by such mortgage or sale is to be paid to the plaintiff, Lord Viscount Fane, the executor of his will, to be considered as part of the said late Lord Viscount Fane's personal estate. And for the better clearing of the said accounts, &c. [See Usual Directions, No. II. *ante.*] And it is ordered that all parties have their costs of this suit to be taxed by the said Master out of the estate, which are to be raised by mortgage or sale of the said term of 500 years in like manner as the

said sum of 25,000*l.* is before directed to be raised. *Fane v. Earl of Sandwich*, L. C. 3d May, 1748. Reg. Lib. A. 1747. fol. 516.

NOTE.

(1) For like Directions. See *Gibson v. Stiles*, Appendix (1). *Gibson v. Lord Montford*, Appendix (2).

APPENDIX (1).

Direction that Parties paying off Creditors should stand in their place.

And in case any of the parties to these suits shall have paid any debts of the said testator, or any demands on his estates, they are to stand in the place of the creditors, or other persons so paid, to receive a satisfaction for the same out of the said estates, in such manner as the same (if they had remained unpaid) would have been satisfied according to this decree. *Gibson v. Stiles*, L. C. 18th July, 1741. Reg. Lib. A. 1740. fol. 550.

For like direction. See *Equity Draftsman*, 662.

APPENDIX (2).

Direction for Trustees to stand in place of Persons paid by them.

[*Inter alia*] And if in taking of the said accounts it shall appear that the said defendants, the trustees, paid any sums of money out of the personal estate which were properly charges upon the real estate, it is further ordered that the said defendants, the trustees, do stand in the place of the persons to whom such payments have been made, to receive satisfaction for the same out of the real estate, and that the same be carried from the credit of these causes on account of the real estates to the credit of these causes on account of the personal estate in the books of the said Accountant-General. *Gibson v. Lord Montford*, L. C. 25th June, 1750. Reg. Lib. A. 1749. fol. 583. S. C. 1 Ves. 485.

No. XIII.

DECREE FOR ADMINISTRATION OF REAL AND PERSONAL ASSETS, WHERE TRUST CREATED FOR PAYMENT OF DEBTS.—INQUIRY AS TO CONTRACTS FOR SALE. SALE SUBJECT TO MORTGAGES, &c.

Their Lordships do declare the will and codicil of the said testator, Sir Simeon Stuart, well proved, and that the indentures of lease and release of the 2d and 3d days of April, 1779, are a revocation of the said testator's will and codicil *pro tanto* only; and that the said testator's will and codicil ought to be established, and the trusts thereof, so far as the same are not revoked by the said indentures of lease and release ought to be performed and carried into execution, and do order and decree the same accordingly. And it is further ordered, that it be referred to Mr. T. one &c. to take an account of the personal estate of the said testator not specifically bequeathed, come to the hands of the defendant, Dame Anna Stuart, the administratrix of the goods and chattels of the said testator, with his will annexed, and of any other person &c. And it is further ordered, that the said Master do also take an account of the said testator's debts, funeral expenses, and legacies, and particularly an account of what is due for principal and interest on any mortgages on his estate, and compute interest &c. [See Decree in Suit by Legatee. Personal Assets, No. IV. *ante*.] And in taking of the said account of the said testator's debts, it is ordered, that the said Master do distinguish which of the creditors of the said testator have executed the said indentures of lease and release. And their Lordships do declare, that such of the said testator's creditors, at the date of the said indenture of release, as have executed or shall execute the same, are entitled to the benefit thereof: and it is ordered, that any of such creditors be at liberty to execute the same. And it is further ordered, that the said testator's said personal estate be applied in payment of his debts and funeral expenses in a course of administration, and then in

payment of his legacies. But in case the said testator's personal estate not specifically bequeathed shall not be sufficient for payment of his debts, funeral expenses, and legacies, their Lordships do declare, that the estates of the said testator by the said indentures of lease and release conveyed in trust to be sold for payment of the debts due to his creditors who have executed or shall execute the said indenture of release ought to be sold to raise such deficiency, and also to satisfy what shall be reported due to his creditors by mortgage and judgment according to the terms of the deed poll, bearing date the 14th day of October, 1779, indorsed on the said indenture of release. And the defendant Nairn by his counsel desiring to relinquish the contract entered into by him for purchasing part of the said testator's estate, it is ordered that such contract be set aside. And it is further ordered, that it be referred to the said Master to look into the contracts (1) entered into by the defendants Prowting, Lowe and Knight respectively for the purchase of other parts of the said estates, and consider whether such estates have been properly sold and disposed of, and whether such contracts are fit and proper to be carried into execution. And in case the said Master shall find that such estates have been properly sold, and that the contracts are fit and proper to be carried into execution, then it is ordered that the said Master do enquire whether a good title can be made to the said estates respectively. And in case he shall find that good titles can be made to such estates respectively, it is ordered that such contracts be specifically performed and carried into execution. And it is further ordered that the said Master do inquire what is due from the said defendants Prowting, Lowe and Knight respectively for their purchase money of the said estates upon the terms of their contracts. And it is further ordered, that what if any thing, shall appear to be due from them respectively, be paid by them respectively into the Bank with the privy &c. [See Usual Directions, No. X. *ante.*] And on such payment it is ordered that all proper parties as the said Master shall direct, do convey the said purchased premises to

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the defendants the purchasers, and deliver to them upon oath all deeds and writings in their custody or power relating thereto, or as they shall direct. And it is ordered that the said Master be at liberty to make a separate report or reports relating to such purchases. And it is further ordered that the rest of the estates comprised in the said indentures of lease and release be sold with the approbation &c. [See Usual Directions, No. VI. *ante.*] And it is further ordered that the said Master do inquire whether there are any and what mortgages, judgments or other incumbrances that affect the estates in question respectively or any of them, and particularly to state the claim made by the defendants the executors of the late defendant Willis to be mortgagees in equity of the estate in the county of Hants. And it is further ordered, that he do take an account of what is due on such mortgages, judgments, (2) or other incumbrances, and also state their priorities (3). And in case any such mortgagee, judgment creditor, or other incumbrancer, shall be willing to join in a conveyance of the said estates to the purchaser or purchasers thereof, it is ordered that what shall appear to be due to such mortgagee, judgment creditor, or other incumbrancer, affecting such estate, be paid in the first place out of the money which shall be raised by the sale of such estate, which shall appear to be charged with such mortgages or incumbrances respectively, according to their priorities, which the said Master is to state. And it is further ordered that the said Master be at liberty to make a separate report or reports concerning the same. And it is further ordered that the residue of such purchase money be paid into the Bank, with the privity &c. [See Usual Directions, No. X. *ante.*] But in case such mortgagees or incumbrancers shall not consent to a sale of the said estate, then it is ordered that such estate be sold subject to such mortgages or other incumbrances. (4) And it is further ordered that the said Master do take an account of the rents and profits of all the said estates come to the hands of the said defendants Abraham Langford and Robert Langford respectively, or either of them, or to the

hands of any other person or persons by their or either of their order, or for their or either of their use. And in taking such last-mentioned account, it is ordered that the said Master do make unto the said defendants, Abraham Langford and Robert Langford, all just allowances, and particularly all such allowances as are directed to be made unto them by the said indenture of release. And it is further ordered that the said defendants Abraham and Robert Langford do pay what shall be found due from them respectively, on the balance of the said accounts into the Bank with the privity &c. [See Usual Directions, No. X. *ante.*] And it is further ordered that the said Master do enquire and settle what is due to the defendants Bateman and Barnett, for their bill of fees and disbursements, according to the terms of the said deed of release. And it is further ordered that the money which shall arise by the sale of the estates comprised in the said indentures of lease and release, and what shall be coming on the said account of rents and profits hereinbefore directed after payment and satisfaction thereof of the debts reported due to the creditors of the said testator who have liens thereon, by mortgage, judgment or otherwise, and of the costs, charges, and expenses of the trustees and the allowances of the defendants Abraham and Robert Langford, the trustees as aforesaid, be applied according to the terms of the said indenture of release, in payment of what shall be reported due to the said defendants, Bateman and Barnett, for their bill of fees and disbursements, and what was due to the servants of the said testator at the date of the said indenture of release, for their wages, and then in payment of what shall appear to be due to the creditors of the said testator at the date of the said indenture of release, who have executed or shall execute the same, rateably and in proportion to what shall be reported due to them for their respective debts. And it is further ordered, that the said Master do settle the proportion in which they shall be paid accordingly. But in case any of such creditors of the said testator, or any of the creditors by mortgage judgment, or other specific in-

cumbrance, shall exhaust any part of the personal estate of the said testator, towards satisfaction of their respective debts, their Lordships do declare, the said testator's other creditors, who are not within the provisions of the said indenture of release, are to stand in their place, and receive a satisfaction, *pro tanto*, out of the estates comprised in the said indentures of lease and release. And if there shall be any surplus money to be produced from the said estates comprised in the said indentures of lease and release, it is ordered, that the same be applied in payment of what shall be reported due to the creditors (5) of the said testator, if any, whose debts are not provided for by the said indenture of release. And if any of the said testator's specialty creditors shall exhaust any part of his personal estate in satisfaction of their debts, their Lordships do declare, that his simple contract creditors, who are not within the provision made by the said indenture of release, have a right to stand in their place and receive a satisfaction *pro tanto*, out of the estates comprised in the indenture of release, after satisfaction of the several other creditors before provided for. And if there shall be any surplus of the produce of the said estates, it is ordered that the same be applied to payment of what shall be reported due to the several legatees for their legacies given to them by the said testator's will; but in case the same shall not be sufficient for that purpose, then their Lordships do declare that the legatees are to abate in proportion between themselves; and it is further ordered, that the said Master do settle the proportion, in which they are to abate accordingly. And if there shall be any surplus of the money to be produced by such sales of the said estates, it is ordered that the same be paid into the bank, with the privy &c. [See Usual Directions, No. X. *ante*.] And it is further ordered, that the same be laid out in the purchase of lands, and settled according to the limitations in the said testator's will. And when any such purchase shall offer, it is ordered, that the parties be at liberty to apply to the Court and propose such purchase; and in the mean time, and until such purchase shall offer, it is ordered, that the same be laid out in

the purchase of bank 3 per cent. annuities, in the name and with the privity &c. [See Usual Directions, No. X. *ante.*] And it is further ordered, that the interest of such bank annuities be paid to the plaintiff until the further order of the Court. And the said Accountant-General is to draw &c. [See Usual Directions, No. XIII. *ante.*] And in case all the creditors of the said testator shall not be satisfied what shall be reported due to them for their debts out of the several funds before mentioned, it is ordered, that they be at liberty to apply to the Court to have the deficiency made good out of the said testator's personal estate specifically bequeathed (6), as they shall be advised. And for the better taking of the accounts &c. [See Usual Directions, No. II. *ante.*] And it is further ordered, that all parties be paid their costs of this suit, to be taxed by the said Master out of the said testator's estates. And any of the parties are to be at liberty to apply (7), &c. [See Usual Directions, No. XIX. *ante.*] *Stuart v. Tichborne*, Lords Commissioners, 19th July, 1783. Reg. Lib. B. 1782. fol. 664.

For order for payment of incumbrancers out of produce of sale, and for acknowledgment of satisfaction, &c See Hand's Pract. 202.

NOTES.

(1) Where there are trustees to sell, and a bill is filed against them, it is not usual to make the purchasers parties, but to state the contracts and pray an inquiry. *Salvidge v. Hyde*, Jac. 153.

(2) *Interest on Judgments.*

In *Robinson v. Harrington*, Appendix (1), (which was a suit by judgment creditors against the debtor, and not in the administration of assets,) interest was directed to be computed on the judgments generally.

And in *Stileman v. Ashdown*, 2 Atk. 481. S. C. Ib. 608. Ambl. 13. Interest was allowed on a judgment in a suit for the administration of assets.

And in *Earl of Bath v. Earl of Bradford*, 2 Ves. 587. interest was

allowed on judgments in the administration of assets, although the demand was founded in a breach of covenant.

But in *Gibson v. Egerton*, 1 Dick. 408. interest under the like circumstances was refused.

And the general rule is not to allow interest on a judgment in the administration of assets. See *Styles v. Attorney-General*, 1 West, 132. *Deschamps v. Vanneck*, 2 Ves. jun. 719.

But where the judgment is on a bond with a penalty, interest will be allowed to the extent of the penalty. *Sharpe v. Earl of Scarborough*, 3 Ves. 557.

In general interest will not be allowed on a bond beyond the penalty. *Bromley v. Goodere*, 1 Atk. 80. *Grosvenor v. Cooke*. 1 Dick. 305. *Gibson v. Egerton*, *supra*. *Kettleby v. Kettleby*, 2 Dick. 514. *Tew v. Earl of Winterton*, 3 Bro. 489. *Knight v. Maclean*, 3 Bro. 496. And see *Mackworth v. Thomas*, 5 Ves. 329. *Clarke v. Seton*, 6 Ves. 411.

Although judgment has been obtained upon it. *Gibson v. Egerton*, *supra*. *Tew v. Earl of Winterton*, *supra*. *Sharpe v. Earl of Scarborough*, *supra*. *Clarke v. Seton*, *supra*.

But there may be exceptions to this rule. *Clarke v. Seton*, 6 Ves. 416.

As where the judgment creditor has been delayed by injunction. *Hale v. Thomas*, 1 Vern. 350. *Duval v. Terry*, Show. P. C. 15. S. C. cited 6 Ves. 79. 92. *Exp. Boyd*, 1 G. & J. 295.

So where the debtor comes into equity for an account of the rents and profits received by the judgment creditor. *Godfrey v. Watson*, 3 Atk. 517. And see *Hale v. Thomas*, 1 Vern. 351. *Earl of Bath v. Earl of Bradford*, 2 Ves. 590.

So where the creditor has a collateral security. *Clarke v. Lord Abingdon*, 17 Ves. 106.

So where the creditor might have retained the rents and profits but applied them in satisfaction of other creditors. *Atkinson v. Atkinson*, 1 Ba. & Be. 238.

It seems that where the judgment was in respect of a demand which carried interest, interest would be allowed in the administration of assets (as in error and in bankruptcy.) See *Exp. Boyd* 1 G. & J. 297.

That at law interest may be recovered in an action a judgment.

See Tidd's Pract. 602. Bedford v. Coke, 1 Dick. 181. Creuze v. Hunter, 2 Ves. jun. 162.

That in an action upon a bond interest cannot be recovered beyond the penalty. See Wild v. Clarkson, 6 T. R. 303. But see Earl of Lonsdale v. Church, 2 T. R. 388.

But that in an action on a judgment on a bond, interest may be recovered beyond the penalty. See M'Clure v. Dunkin, 1 E. R. 436. Bodily v. Bellamy, 2 Burr. 1096. S. C. cited, 6 Ves. 416.

That interest will be allowed in error upon a judgment affirmed. See Tidd's Pract. 1230. Or upon a judgment of *non pros*. Ib. 1232.

But not unless it was recoverable in the court below. Ib. 1231.

Unless the writ of error was brought for delay. Ib. See Earl of Bath v. Earl of Bradford, 2 Ves. 589.

(3) *Priorities.*

In Earl of Bristol v. Hungerford, 2 Vern. 525. it was held that mortgages were to be preferred to judgments and other real incumbrances. And see decree in Bothomly v. Lord Fairfax, 1 P. W. 334. But this was reversed on appeal, and it was held that mortgages, judgments, statutes, and recognizances, were to be paid according to their priorities in order of time. Earl of Bristol v. Hungerford, *supra*. And see cases cited by Solicitor-General, *arguendo*, in Sharpe v. Earl of Scarborough, 4 Ves. 541. But a judgment creditor who has sued out an *elegit*, is entitled to priority over one who has not. Rowe v. Bant, 1 Dick. 152. A recognizance not enrolled, is only considered as a specialty. Bothomly v. Lord Fairfax, *supra*.

The priorities must be taken as they stood at the time of the decree, and cannot afterwards be varied. Earl of Bristol v. Hungerford, *supra*. Wortley v. Birkhead, 2 Ves. 574. And see S. C. 3 Atk. 811. Exp. Knott. 11 Ves. 619.

(4) See Decree for Administration of Legal and Equitable Assets subject to Mortgage &c. No. VII. Note (2), *ante*.

(5) By the will of the testator, his legacies were charged on his real estates, but not his debts. It seems, therefore, that the surplus produce of the trust estates was legal assets, and consequently, that this direction should have been confined to specialty creditors.

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(6) See Decree in Creditor's Suit, Personal Assets, No. I. Note (6), *ante*.

(7) Further Directions are not reserved. See Reservation of Further Directions, No. XV. *ante*.

APPENDIX (1).

Direction for Interest on Judgments.

And it is further ordered, that the said Master do likewise take an account of what is due for principal and interest to the several judgment creditors who are parties to this suit, and also to the several other judgment creditors of the defendant, Henry Harrington; and all the said judgment creditors are to be at liberty to come before the said Master and prove their judgments. And the said Master is to cause an advertisement to be published in the London Gazette, and appoint a peremptory day for that purpose; and such of the said judgment creditors as shall not come in by that time are to be excluded the benefit of this decree. *Robinson v. Harrington*, L. C. 30th June, 1755. Reg. Lib. B. 1754. fol. 350. For Minutes of same Decree. See 2 Newl. Pract. 334.

No. XIV.

**DECREE ESTABLISHING WILL, EXCEPT AS
TO PRODUCE OF REAL ESTATES &c. BE-
QUEATHED TO CHARITIES.**

This Court doth declare the will of Thomas Hodson, the testator in the pleadings named, dated the 11th day of July, 1819, and the codicils thereto, well proved &c. [See Direction for Establishing Will, No. I. *ante*.] except as to so much of the charity legacies thereby bequeathed as are directed to be paid out of the money to arise by sale of the said testator's real and leasehold estates, or to come out of any mortgages or chaftels real belonging to the said testator, and doth order and decree the same accordingly. And as to so much of the said charity legacies as are directed to be paid out of the money to arise by sale of the said freehold and leasehold estates, this Court doth declare that the same is void, as being contrary to the statute passed in the Ninth year of the reign of his late majesty king George the Second, intituled,

“ An Act to restrain the disposition of Lands, whereby the same become unalienable.” And the plaintiffs by their bill, praying that accounts of the said testator’s personal estate, and of the rents and profits of his real estates, received by or come to the hands of the plaintiffs, his executors or executrix, may be taken, this Court doth order that it be referred to Mr. D. one &c. to take an account of the personal estate &c. [See Decree in Suit by Legatee, Personal Assets, No. IV. *ante.*] And it is ordered, that the said testator’s personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a course of administration, and then in payment of his legacies ; but this is to be without prejudice to the question, as to what part of the said charity legacies may be void, and the apportionment thereof ; and for that purpose the said Master is to distinguish such part of the said testator’s said personal estate as arose from leasehold estate, mortgage, or chattels real. And it is ordered, that the said Master do take an account of the rents and profits &c. [See Decree in Suit by Bond Creditor, No. III. *ante.*] And for the better taking the said accounts &c. [See Usual Directions, No. II. *ante.*] And the said Master is to be at liberty to make a separate report, or reports, as &c. And this Court doth reserve the consideration of all further directions, and of the costs of this suit, until &c. [See Usual Directions, No. XV. and No. XVII. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Hayter v. Goode*, V. C. 18th March, 1822. Reg. Lib. A. 1821. fol. 1353.

No. XV.

DECREE ON FURTHER DIRECTIONS IN ORIGINAL SUIT AND IN SUPPLEMENTAL SUIT, ESTABLISHING CHARITY, AND APPORTIONING GENERAL PERSONAL ESTATE, AND REAL SECURITIES.

[The testator bequeathed the residue of his personal estate, part of which consisted of mortgages, to a charity.

After the original decree one of the next of kin assigned her interest in the mortgages to the charity ; upon which the supplemental bill was filed.]

His Honour doth order, and in the original cause declare, that the debts, funeral expenses, and legacies of the said testator, Robert Chapman, and also the costs of the original suit, ought to be paid out of the said testator's general personal estate, and out of the money secured by mortgage, or upon other real securities, *pro ratâ*, except so far as such costs relate to any proceedings to be had under the directions hereinafter given for regulating the charity in question, or appointing new trustees thereof, which ought to be wholly paid out of the said testator's general personal estate. And it is ordered, that it be referred to the said Master, Mr. S., to tax all parties their subsequent costs of the original suit. And the defendant, George Pitt Hurst, out of the sum of £—— appearing &c. is to retain his own, and is to pay unto the several other parties in the said cause their costs of that suit already taxed, and subsequent costs when taxed. And it is ordered, that the defendants, Heneage Deering and George Pitt Hurst, the executors of the said testator, do proceed to get in the money due on the mortgage mentioned in the said report to be outstanding, and also any other outstanding personal estate of the said testator. And it is ordered that the said Master do take an account of the same, and ascertain how much thereof and of the other personal estate of the said testator not specifically bequeathed, will constitute principal and interest secured by mortgage, or other real security, and how much

will constitute the general residue of the said testator's personal estate, exclusive of principal and interest secured by mortgage, or other real security. And it appearing that the said testator's debts, legacies, and funeral expenses have been paid out of the general personal estate, it is ordered, that the said Master do ascertain what are the several proportions thereof, and also of the costs of the original suit, to be borne out of the said funds respectively (1). And the said Master is to make a separate report thereof; and after the said Master shall have made such report any of the parties are to be at liberty to apply to the Court concerning the same, as they shall be advised. And it is ordered, that the Defendant, Sir Thomas Hanmer, do assign the trust vested in him by the said testator's will to William Praed, approved of by the said Master as a new trustee in his room (2). And his Honour doth declare that the surplus of the said testator's personal estate, exclusive of such part thereof as shall appear to have been secured by mortgage, or upon other real security (after bearing the proportion of the debts, funeral expenses, and legacies of the said testator, and of the costs hereinbefore directed to be borne thereout) ought to be applied for the several charitable purposes mentioned in the said testator's will. And it is ordered, that such surplus be retained by or paid to the defendants, George Earl of Winchelsea and Nottingham &c. the trustees, to, for, and upon the several charitable trusts, intents, and purposes in the said testator's will mentioned. And any of the parties are to be at liberty to lay a scheme (3) before the said Master, for applying the charitable fund given by the said testator's will, and also for keeping up the number of trustees named in the said will, as any of them shall from time to time die. (2) And his Honour doth declare, that one moiety of so much of the said testator's personal estate as shall appear to have arisen from money secured by mortgage, or upon other real security (after bearing the proportion of the debts, funeral expenses, and legacies of the said testator, and of the costs hereinbefore directed to be paid thereout) will belong to the defendant, Richard Daniel, as he is one of

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the next of kin of the said testator. And it is ordered, that such moiety be paid to him accordingly. And his Honour doth also declare, that the other moiety belonged to the defendant, Mary Chapman, as the other next of kin of the said testator. And on the supplemental bill his Honour doth declare, that the deed of trust, dated the 10th day of December, 1790, ought to be established and carried into execution; and doth order and decree the same accordingly. And the said Master is to tax all parties their costs of the supplemental suit, and to inquire whether the defendants, the trustees, have been put to any and what expenses respecting the said trust deed. And it is ordered, that the costs of the supplemental suit, and also any such expenses as the said defendants, the trustees, may appear to have been put to under the aforesaid inquiry, be paid out of such part of the said testator's estate, as, according to the declaration made in the original cause, would have belonged to the said defendant, Mary Chapman. And his Honour doth declare that the residue thereof (after payment of such costs and expenses thereout as aforesaid) will, according to the said trust deed, now be applicable to the several charitable purposes mentioned in the said testator's will. And it is ordered, that the same be paid to or retained by the said defendants, the trustees, to, for, and upon the charitable trusts, intents, and purposes in the said will accordingly. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Attorney-General v. Hurst*, M. R. 2d December, 1791. Reg. Lib. A. 1791. fol. 487. S. C. (*Attorney-General v. Earl of Winchelsea*) 3 Bro. 373. 2 Cox, 364.

For Decree for establishing Charity, with Direction for Scheme. See Equity Draftsman, 660.

For Direction for Scheme. See *Attorney-General v. Mayor of Coventry*. Appendix (1).

NOTES.

(1) See *Paice v. Archbishop of Canterbury*, 14 Ves. 372.

(2) See *Decrees respecting Executors and Trustees*, No. IV. *post.*

(3) *Scheme.*

Where there is a general indefinite charitable purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but where the execution is to be by a trustee, with general, or some objects pointed out, there, the Court will take the administration of the trust. *Moggridge v. Thackwell*, 7 Ves. 36. And see *Paice v. Archbishop of Canterbury*, 14 Ves. 372. *Ommaney v. Butcher*, Turn. 270.

Where the Court takes upon itself the execution of the trust, a scheme is usually directed. *Attorney-General v. Hurst*, *supra*. And see *Waldo v. Caley*, 16 Ves. 211. *Paice v. Archbishop of Canterbury*, *supra*. *Attorney-General v. Whiteley*, 11 Ves. 241. *Bishop of Hereford v. Adams*, 7 Ves. 326. *Attorney-General v. Bowyer*, 3 Ves. 724. *Supple v. Lowson*, Ambl. 730. *Baylis v. Attorney-General*, 2 Atk. 240. note. And Decree in *Attorney-General v. Doyley*, 7 Ves. 58. note. S. C. 2 Eq. Abr. 194.

A scheme will be directed, notwithstanding that the trustee has a discretionary power, in order to secure the application of the fund. *Supple v. Lowson*, *supra*. And see *Waldo v. Caley*, *supra*.

But not where the fund is part of an annual and temporary income, to be disposed of from time to time, as objects should present themselves. *Waldo v. Caley*, *supra*.

Where a fund was given to a corporation for a charitable purpose, the Court ordered it to be paid to the corporation without directing a scheme. *Society for the Propagation of the Gospel v. Attorney-General*, 3 Russ. 142.

When it is settled by the decree who are to be active in prosecuting it, it seems that the Master might receive a proposal for a scheme without a direction for that purpose; but that in the Master's office the course is not to act without a specific direction. *Attorney-General v. Bowyer*, *supra*.

A scheme is frequently directed, regard being had to particular circumstances. See *Attorney-General v. Skinners' Company*, Jac. 629. *Pieschell v. Paris*, 2 S. & S. 392. Decree in *Mills v. Farmer*, 1 Mer. Appendix, 723. *Moggridge v. Thackwell*, 1 Ves. jun. 475. S. C. 7 Ves. 86. *Attorney-General v. Painter-Stainers' Company*, 2 Cox, 61. *Cook v. Duckenfield*, 2 Atk. 569.

For scheme for establishment of charity. See 2 Turn. Pract. 462.

*Decrees respecting Real Assets.**Further Directions.*

On exceptions the Court has reformed the scheme without referring it back to the Master to review his report. *Attorney-General v. Wansay*, 15 Ves. 235.

That in a charity case the original decree may be altered on further directions. See Usual Directions, No XV. *ante*.

APPENDIX (1).

Direction for Scheme.

And it is ordered, that any of the relators and the defendants, the corporation of the city of Coventry, do propose before the said Master a scheme or schemes, for the application of what shall be coming on the balance of the said account, for the moiety of the said rents and profits for the poor inhabitants of the said city of Coventry, and also for that moiety of the growing rents and profits of the said charity estate, in such manner as may be most beneficial for the said poor inhabitants. And the said Master is to state the same, with his opinion thereon, to the Court. *Attorney-General v. Mayor of Coventry*, L. C. 2d March, 1743. Reg. Lib. A. 1742. fol. 330.

No. XVI.

MODERN DECREE FOR ADMINISTRATION OF
REAL AND PERSONAL ASSETS.

[The real estate was charged with the payment of debts.]

His Honour doth declare the will of the testator Joseph Hart well proved &c. [See Direction for Establishing Will, No. I. *ante*.] And it is ordered that it be referred to Mr. S. one &c. to take an account of what is due to the plaintiff, and all other the creditors of Joseph Hart, the said testator for their debts &c. [See Decree in Creditors' Suit, Personal Assets, No. I. *ante*.] And it is ordered that the said Master do also take an account of the personal estate of the said testator not specifically bequeathed, come to the hands of &c. [See Decree in Creditors' Suit, Personal Assets, No. I. *ante*.] And it is ordered, that the personal estate of the said testator not specifically bequeathed be applied in payment of what shall be found due to the plaintiff and the

other creditors for their debts, and of his funeral expenses in a course of administration. And in case such personal estate shall not be sufficient for payment thereof, it is ordered that the said Master do inquire and state to the Court what real estates the said testator was possessed of at the time of making his will, and what at the time of his death ; and take an account of the rents and profits thereof accrued since his death, received by &c. [See Decree in Suit by Bond Creditor, No. III. *ante.*] And for the better taking the said accounts and discovery of the matters aforesaid &c.[See Usual Directions, No. II. *ante.*] And his Honour doth reserve the consideration of all further directions (1) and of the costs of this suit until after &c. [See Usual Directions, No. XV. and No. XVII, *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Petty v. Woodville*, M. R. 15th November, 1814. Reg. Lib. B. 1814. fol. 118.

NOTE.

(1) In modern decrees for the administration of real assets, the Court seldom goes further in the first instance than to direct an account of the personal estate, and an inquiry as to the real estate. *Petty v. Woodville*, *supra*. And see Reservation of Further Directions, No. XV. *ante*.

No. XVII.

DECLARATION IN DECREE FOR ADMINISTRATION OF ASSETS OF TRADER.

This Court doth declare the will of H. L. the testator in the pleadings named well proved &c. [See Establishing Will, No. I. *ante.*] And this Court doth declare the said testator a trader within the intent and meaning of the bankrupt laws. (1) *Gibbins v. Lloyd*, V. C. 23d June, 1815. Reg. Lib. A. 1814. fol. 1471.

NOTE.

(1) Sometimes an inquiry is directed as to the trading. *Elgar v. Coleman*, Appendix (1). *Hayden v. Bousey*, Appendix (1).

But it seems that this is improper. See *Lechmere v. Brasier*, 2 J. & W. 288. And see Decrees for Cause to stand over &c. No. II. *post*.

APPENDIX (1).

Inquiry as to trading.

It is ordered, that the said Master do inquire whether the said testator was a trader within the intent and meaning of the statutes relating to bankrupts. And in case he shall find that he was such trader, it is ordered that he do inquire what real estate the said testator died seised or possessed of or entitled to, and what interest he had therein. *Elgar v. Coleman*, M. R. 15th November, 1814. Reg. Lib. A. 1814. fol. 119.

So in *Hayden v. Bousey*, M. R. 24th November, 1814. Reg. Lib. A. 1814. fol. 119.

No. XVIII.

DIRECTION WHERE CHARGES PARAMOUNT TO WILL OF TESTATOR.

And it is further ordered, that the said Master do inquire whether any and what annuities given by the wills of the said testator's father, Samuel Shephard, or of his brother, Francis Shephard, are now subsisting and payable out of any part of the said testator's estate, and that such of them as are given by the will of the said Francis Shephard and charged on his real estate be from time to time paid by the receiver of the testator's estate in Lincolnshire, which was devised to him by the said Francis Shephard, subject to the said annuities. *Gibson v. Lord Montfort*, L. C. 25th June, 1750. Reg. Lib. A. 1749. fol. 583. S. C. 1 Ves. 485. Ambl. 93.

No. XIX.

DIRECTION FOR RENEWAL OF LEASE.

And the plaintiff and the said defendant Wortley, or either of them, is to be at liberty to renew the lease of the estate called Lawhilton, and surrender the lease now in being for that purpose, and the new lease to be granted thereof is to be taken in the name of a trustee or trustees, to be approved by the said Master, subject to the order of this Court. And it is ordered that such trustee or trustees do

declare the trust thereof accordingly. And such of the said parties as shall pay the fine and charges of such renewal are to be considered as incumbrancers on that estate for the same. And it is ordered that the interest be computed at the rate of 5*l.* per cent. per annum for the money that shall be so advanced for the fine and charges of the said renewal. *Birkhead v. Manaton*, L. C. 25th January, 1748. Reg. Lib. A. 1748. fol. 308. S. C. 2 Ves. 571. 3 Atk. 809.

No. XX.

FURTHER DIRECTIONS.

APPORTIONMENT OF COSTS BETWEEN LEGAL
AND EQUITABLE ASSETS.

[*Inter alia*] His Lordship doth order that the said Master do tax all parties except the defendant Thomas Whelpdale, (who waives his costs) their costs subsequent to the last taxation. And it is further ordered that such costs when taxed, and the costs of the parties already taxed (except as aforesaid) be paid out of the respective estates, (that is to say) such as relate to the legal assets out of such assets, and such as relate to the estates devised in trust for payment of debts out of the produce of those estates. And it appearing from the report of the 8th of July instant, that the sum of £—— is the amount of the equitable assets, and consequently, that the rest of the funds are legal assets, It is ordered that £—— part of £—— cash in the Bank in this cause be carried over and placed to the credit of this cause, and to the account of equitable assets. And it is further ordered that the remainder of the said £—— and also &c. be carried over and placed to the credit of this cause to the account of legal assets. And it is ordered that the costs already taxed and that shall be taxed, relating to the said equitable assets, be paid out of the said sum of £—— when carried over as before directed. And it is further ordered that the costs already taxed, and that shall be taxed, which the said Master shall find to relate to the legal

assets, be paid out of the remainder of the said £— hereby directed to be carried to the account of legal assets as follows, (to wit) the plaintiff's costs to Mr. R. L. their solicitor &c. [See Usual Directions, No. XVIII. Note (2) *ante*.] And for the purposes aforesaid, the Accountant-General is to draw &c. [See Usual Directions, No. XIII. *ante*.] *Lowthian v. Hasell*, L. C. 23d July, 1790. Reg. Lib. B. 1789. fol. 698. S. C. 4 Bro. 168. 2 Dick. 737.

DECREES RESPECTING MORTGAGES.

No. I.

DECREE FOR FORECLOSURE.

His Honour doth think fit and so order and decree, that it be referred to Mr. K. one &c. to compute what is due to the plaintiffs for principal and interest on their mortgage, and to tax them their costs (1) of this suit, for the better discovery whereof &c. [See Usual Directions, No. II. *ante.*] And upon defendants paying unto the plaintiffs what shall be reported due to them for principal, interest, and costs as aforesaid, within six months (2) after the said Master shall have made his report, at such time and place as the said Master shall appoint (3), it is ordered, that the said plaintiffs do reconvey the mortgaged premises free and clear of all incumbrances done by them, or any claiming by, from, or under them, and do deliver up all deeds and writings in their custody or power relating thereto upon oath to the said defendants, or to whom they shall appoint. But in default of the said defendants' paying unto the said plaintiffs such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed, that the said defendants do stand absolutely debarred and foreclosed (4) of and from all equity of redemption of, in and to the said mortgaged premises. *Thornbury v. Dutton*, M. R. 17th May, 1748. Reg. Lib. B. 1747. fol. 293.

For like decree. See *Equity Draftsman*, 654.

For orders under the stat. 7 Geo. 2. c. 20. See 2 *Fowl.* 469. *Equity Draftsman*, 652.

NOTES.

(1) *Costs.*

For the rule that a mortgagee is entitled to costs, and the exception to it. See Beames on Costs, 39. 45.

If any costs have been incurred by the mortgagee in addition to those of the suit, they should be particularly mentioned. See Knowles v. Chapman, No. VI. *post.* Hill v. Pryce, No. VII. *post.* Sambroke v. Hanbury, No. IX. *post.* Dalton v. Wilson, No. X. *post.*

(2) *Time for Redemption.*

The time is to be computed by calendar months, not by lunar ones. Harr. vol. ii. p. 101. ed. 1767.

This time will be enlarged on motion. See Order for enlarging Time, No. II. *post.*

Otherwise on a bill for redemption. See Decree for Redemption, No. IV. *post.*

(3) See Direction for Payment, Usual Directions, No. VIII. *ante.*

(4) *Foreclosure.*

Formerly, if the money was not paid by the time appointed by the Master, the mortgagor was absolutely foreclosed; but now, upon default, a further order is necessary. Sheriff v. Sparks, 1 West, 130. And see Final Order for Foreclosure, No. III. *post.*

Possession.

The Court does not direct the mortgagor to deliver up the possession of the mortgaged premises to the plaintiff, but leaves the plaintiff to his ejectment. See Sutton v. Stone, 2 Atk. 101.

Otherwise in case of redemption, No. IV. *post.*

Where the mortgagor is in possession, he is not in the situation of tenant at all; or at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or trespasser, at the option of the mortgagee. Doe v. Maisey, 8 B. & C. 767. And see Partridge v. Beer, 5 B. & A. 605, note. Hall v. Doe, Ib. 687. Coote on Mortgages, 326.

He is not therefore entitled to notice to quit. Doe v. Maisey, *supra.* Keech v. Hall, Dougl. 22.

Nor to emblements. Keech v. Hall, *supra.* Moss v. Gallimore, Ib. 283. Birch v. Wright, 1 T. R. 383.

Otherwise where he is tenant at will to the mortgagee by express agreement. *Ex parte Temple*, 1 G. & J. 216.

So where the premises are in the possession of a tenant under a lease subsequent to the mortgage, the tenant is not entitled to notice to quit. *Keech v. Hall*, Dougl. 21. Whether in that case the tenant is entitled to emblements, Q. S. C. 23.

Where, at the date of the mortgage, the premises are in the possession of a tenant from year to year, the tenant is entitled to notice to quit. See *Birch v. Wright*, 1 T. R. 380.

Where the premises are in the possession of a tenant under a lease prior to the mortgage, it has been held that the mortgagee may recover in ejectment, giving notice to the tenant that he does not mean to disturb his possession, but only requires the rent to be paid to him. See *White v. Hawkins*, Dougl. 23, note. *Moss v. Gallimore*, Dougl. 282. But see what is said by Lord Mansfield of this practice. *Moss v. Gallimore*, *supra*.

Past Rents.

Where the mortgagor has been permitted to remain in possession, the mortgagee is not entitled to an account of past rents and profits. *Higgins v. York Buildings Company*, 2 Atk. 107. *Mead v. Lord Orrery*, 3 Atk. 244. *Colman v. Duke of St. Albans*, 3 Ves. 32. *Drummond v. Duke of St. Albans*, 5 Ves. 438. *Ex parte Wilson*, 2 V. & B. 252. S. C. 1 Rose, 444.

So the mortgagee of a term not having taken possession during the term, is not entitled to rents and profits accrued during the term, though in the hands of a receiver. *Gresley v. Adderley*, 1 Swan. 573.

Where the mortgaged premises were in the possession of a tenant under a lease prior to the mortgage, the mortgagee was held entitled to arrears of rent due from the tenant at the time of notice of the mortgage, as well as to subsequent rent. *Moss v. Gallimore*, Dougl. 279. And see *Birch v. Wright*, 1 T. R. 378.

But the rents having been paid over to the assignees of the mortgagor (who had become bankrupt) notwithstanding notice, could not be recovered back. *Ex parte Wilson*, *supra*.

Where the first mortgagee is in possession, a second mortgagee is entitled to rents paid over by the first mortgagee to the mortgagor after notice of the second mortgage. *Berney v. Sewell*, 1 J. & W. 650. And see *Parker v. Calcraft*, 6 Mad. 11.

Whether an equitable mortgagee is entitled to past rents. Q. Ex parte Bignold, 2 G. & J. 273. Ex parte Alexander, 2 G. & J. 275. And see Equitable Mortgage, No. XVI. *post*.

No. II.

ORDER FOR ENLARGING TIME.

[The Master had appointed the 23d of December for the payment of the principal, interest, and costs.]

This Court doth order, that upon the said defendant's paying unto the plaintiff, on or before the 23d day of December, inst. the sum of £——, reported due to the plaintiff for interest and costs on his said mortgage by the said Master's report, the time for the defendant's redeeming the said mortgaged premises be enlarged for six months. And upon such payment it is ordered, that it be referred back to the said Master to compute the plaintiff his subsequent interest and tax him his subsequent costs, and also the costs of this application, and to appoint a new time and place for payment of what shall be found due to the plaintiff in respect thereof. But in default of the defendant's paying unto the plaintiff the said sum of £—— by the time aforesaid, the said defendant is to stand absolutely foreclosed. *Edwards v. Cunliffe*, V. C. 10th December, 1814. Reg. Lib. A. 1814. fol. 115. S. C. 1 Mad. 287.

For an order to enlarge time on bill of foreclosure. See Hand's Pract. 191.

NOTE.;*Order for enlarging Time.*

It seems that formerly the time might be enlarged, without imposing any terms on the defendant. See *Ismoord v. Claypool*, 1 Ch. Rep. 262. Afterwards it became the practice to enlarge the time upon computing subsequent interest upon the whole sum found due for principal, interest, and costs. See *Bickham v. Cross*, 2 Ves. 471. *Bennet v. Edwards*, 2 Vern. 392.

But now, the ordinary terms upon which the Court enlarges the time are the payment of the sum reported due for interest and costs,

and carrying on the account of subsequent interest and costs, including the costs of the application. *Edwards v. Cunliffe, supra.* And see *Monkhouse v. Corporation of Bedford*, 17 Ves. 382.

On these terms the time will be enlarged for six months, and again for three months. *Monkhouse v. Corporation of Bedford, supra.*

In the Exchequer the time may be enlarged, but not as of course. *Quarles v. Knight*, 8 Price, 630.

In *Edwards v. Cunliffe, supra.* a fourth order was made for enlarging the time, though the third was directed to be peremptory.

The decree being appealed from, the time will be enlarged on terms. *Monkhouse v. Corporation of Bedford, supra.*

So, pending exceptions to the report, the time will be enlarged, until the exceptions are disposed of. *Renvoize v. Cooper*, 1 S. & S. 365.

And the time having been suffered to elapse pending the exceptions, the Court refused to make a final order for foreclosure, and enlarged the time. S.C.

No. III.

FINAL ORDER FOR FORECLOSURE.

Upon opening of the matter this present day unto this Court by Mr. J. being of the plaintiff's counsel, it was alleged that by the order made on the hearing of this cause, it was referred to Mr. E. one &c. to take an account &c. pursuant whereunto the said Master on the 5th of March last made his report, and thereby certified the sum of £—— to be due to the plaintiff for principal, interest, and costs, on the said mortgage, which he appointed to be paid on the 5th day of September last between the hours of ten and twelve of the clock in the forenoon, at the Chapel of the Rolls, in Chancery Lane, at which time and place W. W. being duly authorised by the plaintiff, attended to have received the said money, but neither the plaintiff nor any person on his behalf did then attend to pay, or have since paid or tendered the same, as by the affidavit of the said W. W. now read appears; and therefore it was prayed that the said defendant may now be and stand absolutely debarred and foreclosed, of and from all

right, title, interest, equity, and benefit of redemption, of, in and to the said mortgaged premises; which, upon reading the decree, the Master's report, and the order for confirming the same, this Court held reasonable; and doth order the same accordingly. *Wyndham v. Skylling*, M. R. 3d November, 1747. Reg. Lib. B. 1747. fol. 9.

For like orders. See *Hand's Pract.* 193. 195.

NOTE.

Final Order.

That a decree of foreclosure cannot be pleaded until a final order has been obtained. See *Interlocutory Decrees*, *ante*.

That a new estate is acquired by the final order which will not pass by a previous will. See *Thomas v. Grant*, 4 Mad. 438.

A release of the equity of redemption after decree, is equivalent to a final order. *Reynoldson v. Perkins*, Ambl. 564.

No. IV.

DECREE FOR REDEMPTION AGAINST MORTGAGEE IN POSSESSION.

[*Inter alia*] His Lordship doth think fit and so order and decree, that it be referred to Mr. B. one &c. to take an account of what is due to the defendant Robinson for principal and interest on his said mortgage, and to tax him his costs of this suit. And the said Master is also to take an account of the rents and profits of the said mortgaged premises come to the hands of the said defendant Robinson, or of any other person or persons by his order or for his use, or which he without his wilful default (1) might have received. And what shall be coming on the said account of rents and profits is to be deducted out of what shall be found due to the said defendant Robinson for principal, interest and costs. And for the better taking the said account all parties are to produce &c. [See *Directions*, No. II. *ante*.] And what upon the balance of the said account shall be certified due to the said defendant Robinson for his principal, interest and costs, it is ordered and decreed that the said plaintiff Arthur Oneley do pay the

same unto the said defendant Robinson within six months (2) after the said Master shall have made his report, at such time and place as the said Master shall appoint, and that thereupon the said defendant do re-surrender the said mortgaged premises unto the said plaintiff Arthur Oneley, or unto such person or persons as he shall direct, free and clear of all incumbrances done by him or any person claiming by from or under him, and deliver unto the said plaintiff upon oath all deeds and writings (3) in his custody or power relating to the said mortgaged premises. But in default of the said plaintiffs paying unto the said defendant Robinson what shall be so certified due to him for principal, interest and costs as aforesaid, after such deductions made thereout as aforesaid, at such time and place as aforesaid, it is ordered that the said plaintiff's bill as against the said defendant Robinson do from thenceforth stand dismissed (4) out of this Court with costs, to be taxed by the said Master. *Oneley v. Moor*, L. C. 25th October, 1742. Reg. Lib. B. 1742. fol. 142.

For minutes of same decree. See 2 Newl. Pract. 338.

NOTES.

(1) *Wilful Default.*

It is said that Lord Keeper Finch declared that it should be the rule that a mortgagee should only be accountable for what profits he should receive, and not for what he might have received, unless there were fraud. See 2 Fonbl. 432. note.

But a mortgagee in possession must account for what he might have received without his wilful default. *Anon.* 1 Vern. 45. *Hughes v. Williams*, 12 Ves. 493. *Rowe v. Wood*, 2 J. & W. 556. And see *Bulstrode v. Bradley*, 3 Atk. 582. *Webber v. Hunt*, 1 Mad. 13. *Quarrel v. Beckford*, 1 Mad. 274.

In 2 Turn. Pract. 188. note, it is said, that of late it has become the practice not to insert this direction, except under special circumstances. *sed. qu?*

The mortgagee is not bound, however, to enter into speculations for the benefit of the mortgagor. *Hughes v. Williams*, *supra*.

If he enters into possession himself he is liable to account for the full value. *Marony v. O'Dea*, 1 Ba. & Be. 118. *Lord Trimleston v. Hamill*, 1 Ba. & Be. 385. *Knowles v. Chapman*, No. VI. *post*.

Decrees respecting Mortgages.

In *Marony v. O'Dea*, *supra*. Lord Manners thought that if the mortgagee entered into possession, under an agreement with the mortgagor for a fair and stipulated rent, it would be an exception to the rule. But in *Webb v. Rorke*, 2 Sch. & Lefr. 661. Lord Redesdale held, that a lease from a mortgagor to a mortgagee could not be supported on grounds of policy.

(2) Enlarging Time.

On a bill to redeem, the time for redemption will not be enlarged. *Novosielski v. Wakefield*, 17 Ves. 417. Otherwise in the case of a bill for foreclosure, No. I. Note (2), *ante*.

(3) Delivery of Deeds.

Where the title deeds relate to the mortgaged estates jointly with others, particular directions will be given. *Yates v. Hambly*, Appendix (1).

It seems that the party entitled to the estate of the greatest value is entitled to the possession of the title deeds, entering into a covenant to produce them, and allow copies to be taken when required. See order in the case of a purchaser, said to be settled by Lord Hardwicke. *Hand's Pract.* 152.

And see Decrees for Partition, *post*.

Possession.

On a bill to redeem, the Court will order the defendant to deliver up possession to the plaintiff, without putting the plaintiff to his ejectment. *Yates v. Hambly*, Appendix (1). *Miller v. Beaty*, Appendix (2).

Otherwise upon a bill of foreclosure. See Decree for Foreclosure, No. I. Note (4), *ante*.

(4) Dismission.

Upon default a further order is necessary for dismissing the bill. See Final Order, No. V. *post*.

APPENDIX (1).

Direction as to Deeds, where Part only of Premises redeemable.

And in case the said plaintiff shall redeem the said two houses as aforesaid, then it is ordered and decreed that all deeds and writings relating to the said seven houses, in the custody or power of any of the said parties, be brought before the said Master upon oath, and such of them as relate to the said two houses only are to be delivered

to the plaintiff; and such of them as relate to the five other houses only are to be delivered to the said defendants William Hambly &c.; and such of them as relate both to the said two houses and five houses the said plaintiff is to be at liberty to have attested copies thereof at his own expense, and then they are to be delivered to the said defendants. *Yates v. Hambly*, L.C. 21st July, 1742. Reg. Lib. B. 1741. fol. 334. S. C. 2 Atk. 360.

APPENDIX (2).

Direction for Delivery of Possession on Bill for Redemption.

And upon the plaintiffs paying what the said Master shall so certify to be due to the said defendants William Hambly &c. for principal, interest, and costs as aforesaid, discounting &c. within &c. at such time &c. it is ordered and decreed that the said defendants do reconvey the said mortgaged premises to the plaintiff, or to whom he shall appoint, free from all incumbrances &c.; and that the said defendants William Hambly &c. do deliver the possession of the said mortgaged premises to the plaintiff. But in default &c. *Yates v. Hambly*, Appendix (1), *supra*.

So in *Miller v. Beaty*, L. C. 12th December, 1746. Reg. Lib. B. 1746. fol. 252.

No. V.

**FINAL ORDER FOR DISMISSION ON BILL
FOR REDEMPTION.**

Upon opening the matter this present day unto the Right Honourable, &c. by Mr. W. being of counsel for the defendant Samuel Worrall, it was alleged that by the decree made on the hearing of this cause, dated &c. it was referred to Mr. P. one &c. to take an account &c. That in pursuance of the said decree, the said Master made his report, dated &c. and thereby certified that &c. which said report stands absolutely confirmed. That it appears by the affidavit of H. R. that he by virtue of a power of attorney from the said defendant Samuel Worrall, did accordingly attend at the said Chapel of the Rolls on the 21st of January from the hour of eleven in the forenoon till after the hour of twelve at noon

the same day, in order to have received the said sum of £——, but that neither the plaintiff or any person on his behalf did attend to pay the said money, but the whole as he verily believes still remains due and unsatisfied to the said defendant Samuel Worrall; and therefore it was prayed that the plaintiff's bill may stand dismissed out of this Court as against the said defendant Samuel Worrall, with costs, to be taxed by the said Master pursuant to the said decree; which upon hearing the said decree, the said Master's report dated &c. and the said affidavit read, is ordered accordingly. *Steward v. Worrall*, L. C, 5th February, 1785. Reg. Lib. B. 1784. fol. 259. S. C. (*Stuart v. Worrall*) 1 Bro. 581.

For like order, see *Hand's Pract.* 197.

NOTE.

Final Order.

Upon the report of what is due, and affidavit of default, a final order will be made for the dismissal of the bill as of course. *Steward v. Worrall*, *supra*. And see *M'Donough v. Shewbridge*, 2 Ba. & Be. 564.

The defendant is entitled to taxed costs, though the cause was heard on bill and answer. *Newsham v. Gray*, 2 Atk. 287.

That the final dismissal of a bill for redemption is equivalent to a decree for a foreclosure. See *Cholmley v. Countess of Oxford*, 2 Atk. 267. *Bishop of Winchester v. Paine*, 11 Ves. 199. But not a dismissal for want of prosecution. *Hansard v. Hardy*, 18 Ves. 460.

Further Directions.

Further directions are not reserved unless under particular circumstances. See *M'Donough v. Shewbridge*, 2 Ba. & Be. 564.

If the mortgagee has been overpaid, he will be decreed to pay the balance due from him with interest. *Quarrel v. Beckford*, 1 Mad. 269. And see *Kempe v. Westbrook*, No. XX. *post*. In that case further directions should be reserved. See *Quarrel v. Beckford*, 1 Mad. 274. And see *Knowles v. Chapman*, No. VI. *post*.

No. VI.

DECREE FOR REDEMPTION WITH SPECIAL DIRECTIONS FOR CHARGES AND ALLOWANCES.

[The mortgage was for a term. The defendant, John Chapman, was the executor of William Chapman, the mortgagee. The defendant Amos was a purchaser of the mortgaged premises with notice. The defendant Knowles was the heir at law of one of the co-heirs in gavelkind of the mortgagor. The plaintiff was the other co-heir.]

His Honour doth order and decree that it be referred to Mr. S. one &c. to take an account of what is due to the defendant John Amos for principal and interest on the mortgage and bond for £50 in the pleadings mentioned, and to tax the costs at law (1) of the late William Chapman, deceased. And it is ordered that the Master do take an account of the rents and profits of the mortgaged premises received by the said late William Chapman in his lifetime, or by the defendants John Chapman and John Amos since his decease, or either of them, or any person or person &c. [See Decree for Redemption, No. IV. *ante.*] And it is ordered, that the said Master do inquire whether the said William Chapman and the defendants John Chapman and John Amos, or either of them, occupied the mortgaged premises, or any part thereof; and if he shall find that they or either of them did occupy the same, it is ordered that he do set a value by way of annual rent on the premises so occupied during the occupation thereof, and charge the defendant John Amos with such value in the said account of rents and profits (2). And it is ordered that the Master do take an account of all sums of money laid out or expended by the said William Chapman and the defendants John Chapman and John Amos, or any or either of them, in necessary repairs (3) on the premises; and it is ordered that what shall be found to have been so expended be deducted from what shall be coming on the account of rents and profits. And in case the Master shall find that the annual

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rents exceed the interest due on the mortgage, it is ordered that he do make annual rests (4); and it is ordered that what shall be coming on account of rents and profits be applied first in payment of the interest of the mortgage, and then in sinking the principal. And it being alleged that the defendant John Amos has redeemed the land-tax charged on the mortgaged premises, it is ordered, that the plaintiff Daniel Knowles do elect before the Master whether or not he will take the same; and in case he shall elect to take the same, it is ordered that the Master do compute interest on the money paid for such redemption at the rate of £5 per cent. per annum, and add the same to what shall be found due to the said defendant John Amos. And in case the Master shall find that that any thing remained due to the defendant John Amos, except for such land-tax and interest, at the time of filing the plaintiff's bill, it is ordered, that he do tax the said defendants John Chapman and John Amos's costs of this suit, and add the same to what shall remain due for principal and interest and costs at law. And upon the plaintiffs paying to the said defendants what shall be reported to remain due for such principal and interest, and for such costs, within, &c. it is ordered, that the defendant, John Amos do re-convey the mortgaged premises free &c. and deliver up all deeds and writings &c. [See Decree for Redemption, No. IV. *ante*] to the plaintiff, Daniel Knowles, or to whom he shall appoint. But in default of the plaintiffs paying to the defendant, John Amos, what shall be reported to remain due as aforesaid by the time aforesaid, the plaintiff's bill is from thenceforth to stand dismissed out of this court, as to the mortgage, with costs to be taxed by the said Master. But in case the Master shall find that there was not any thing due to the defendants at the time of filing the bill, except as aforesaid, His Honour doth reserve the consideration of costs and further directions (5), and doth reserve the consideration of the costs of this suit, as between the plaintiff and the defendant, John Knowles, until after the Master shall have made his report. And for the better taking of the said account

&c. [See Usual Directions, No. II. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] Knowles v. Chapman, M. R. 25th April, 1815. Reg. Lib. A. 1814. fol. 1021.

For a like decree. See Equity Draftsman, 654.

NOTES.

(1) See Decree for Foreclosure, No. I. note (1), *ante.*

(2) See No. IV. Note (1), *ante.*

(3) *Allowances.*

The mortgagee is not allowed any advantage out of the mortgaged estate beyond principal and interest. Gubbins v. Creed, 2 Sch. & Lef. 218. But he will be allowed sums expended by him in necessary repairs and lasting improvements. Knowles v. Chapman, *supra.* Quarrell v. Beckford, 14 Ves. 177. S.C. 1 Mad. 273. Webb v. Rorke, 2 Sch. & Lef. 676. Yates v. Hambly, Appendix (1.) Miller v. Beaty, Appendix (2). So sums expended by him in fines for the renewal of leases. Manlove v. Ball, 2 Vern. 84. Lacon v. Mertins, 3 Atk. 4. Hamilton v. Denney, 1 Ba. & Be. 202. Or in redemption of land tax, if the mortgagor elects to take it. Knowles v. Chapman, *supra.* So sums expended by him in supporting the title of the mortgagor to the estate. Godfrey v. Watson, 3 Atk. 518. And see Lord Trimleston v. Hamil, 1 Ba. & Be. 385. So the extra costs of defending his title at law. Ramsden v. Langley, 2 Vern. 536. So the costs of procuring administration to the mortgagor. S. C. So on redemption by a second mortgagee, the original mortgagee will be allowed extra costs incurred by him in foreclosing the mortgagor. Lomax v. Hide, 2 Vern. 185. And interest will be allowed on sums expended by him. Knowles v. Chapman, *supra.* Decree in Quarrell v. Beckford, *supra.* Decree in Webb v. Rorke, *supra.* Manlove v. Ball, *supra.* Godfrey v. Watson, *supra.* Lacon v. Mertins, *supra.* Yates v. Hambly, Appendix (1). And in the case of a West India mortgage interest will be allowed at the rate payable in the colony. Quarrell v. Beckford, 1 Mad. 273. 282. But he will not be allowed anything for his personal trouble in receiving the rents. Bonithon v. Hockmore, 1 Vern. 316. Godfrey v. Watson, *supra.* Langstaffe v. Fenwick, 10 Ves. 405. Notwithstanding an agreement with the mortgagor for that purpose.

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French v. Baron, 2 Atk. 120. Carew v. Johnston, 2 Sch. & Lef. 301. And see Chambers v. Goldwin, 9 Ves. 271. But he may appoint a receiver with a salary. Bonithon v. Hockmore, *supra*. Godfrey v. Watson, *supra*. Chambers v. Goldwin, *supra*. Langstaffe v. Fenwick, *supra*. Davis v. Dendy, 3 Mad. 170. A mortgagee of a West India estate is allowed to stipulate for the consignments, and to charge a commission. Bunbury v. Winter, 1 J. & W. 261. But not having so stipulated, he will not be appointed consignee by the Court. Cox v. Champneys, Jac. 576.

(4) Annual Rests.

In taking the accounts against the mortgagee annual rests will be directed. Knowles v. Chapman, *supra*. Yates v. Hambly, Appendix (1). Robinson v. Cumming, 2 Atk. 410. Gould v. Tancred, 2 Atk. 534. Quarrell v. Beckford, 1 Mad. 273. Archdeacon v. Bowes, 13 Price, 353. But the direction to take the account with rests is not of course. Davis v. May, 19 Ves. 385. And see Donovan v. Fricker, Jac. 168. Gould v. Tancred, *supra*. In Davis v. May, *supra*, it was held that rests could not be directed from a particular period of the account. But in Wilson v. Metcalf, 1 Russ. 530. rests were directed from the time the mortgage appeared to have been paid off. And see Wane v. Praed. Decrees for Account, No. III., *ante*. The interest never having been in arrear, and the rents having annually exceeded the amount of the interest, rests were directed. Sheppard v. Elliot, 4 Mad. 254. Rests cannot be made by the Master unless directed by the decree. Webber v. Hunt, 1 Mad. 13. Donovan v. Fricker, *supra*. But they will be directed on a motion to rectify minutes. Webber v. Hunt, *supra*. In Raphael v. Boehm, 11 Ves. 102. it is said by the Lord Chancellor that every receipt forms a rest. But it seems that the usual direction is for annual rests. Knowles v. Chapman, *supra*. Yates v. Hambly, Appendix (1). Webber v. Hunt, *supra*. Quarrell v. Beckford, *supra*. Robinson v. Cumming, *supra*. Rests will be made upon the amount of an occupation rent as well as upon rents and profits. Wilson v. Metcalf, *supra*. See further as to Rests, Decrees for Account generally, No. I. Note (6), *ante*; and for Specific Performance, No. II. Note (3), *post*; and respecting Executors and Trustees, No. III. Note (2), *post*.

(5) See No. V. Note, *ante*.

APPENDIX (1).

Direction for Allowance for Repairs.

And what shall be coming on account of the said rents and profits is to be applied, in the first place, in payment of the interest, and then in sinking the principal; and the said Master is to make annual rests. And in taking the said account the said Master is to make all just allowances, and particularly for repairs and lasting improvements made by them, or any under whom they claim, on the said two houses, or either of them. And in case what shall appear to be so laid out for lasting improvements shall not be satisfied by the rents and profits before received, the same is to be added to the principal money due on the said mortgage, and carry interest until the same shall have been satisfied by subsequent rents and profits. *Yates v. Hambly*, L. C. 21st July, 1742. Reg. Lib. B. 1741. fol. 334. S. C. 2 Atk. 360.

APPENDIX (2).

Direction for Allowance for Improvements.

In the taking of which account the said Master is to make unto all parties all just allowances; and is also to make unto the said defendant an allowance for any lasting improvement; and what shall be found due on the said account of rents and profits is to be deducted out of what shall be found due for principal, interest, and costs, as aforesaid. *Miller v. Beaty*, L. C. 12th December, 1746. Reg. Lib. B. 1746. fol. 252.

No. VII.

**DECREE FOR FORECLOSURE OF FREEHOLD,
AND SURRENDER OF FREEHOLD WHERE
MORTGAGEE IN POSSESSION.**

[The mortgage was by a conveyance of the freehold estates and a covenant to surrender the copyhold. The bill prayed a specific performance of the covenant and foreclosure.]

His Honour doth think fit, and so order and decree, that it be referred to Mr. H. one &c. to take an account of what is due to the plaintiff for principal and interest on his mortgage,

and to tax his costs, both at law (1) and in this court. And it is ordered and decreed, that the plaintiff do come to an account before the said Master, for the rents and profits of the mortgaged premises received by him, or by any other person, &c. [See Decree for Redemption No. IV. *ante.*] And for the better taking the said account &c. [See Usual Directions, No. II. *ante.*] And it is further ordered and decreed, that what shall appear to be the balance of the said account of rents and profits, be deducted out of what the said Master shall find due to the plaintiff for principal, interest, and costs as aforesaid. And upon the defendants paying unto the plaintiff what the said Master shall certify to remain due to him for principal, interest, and costs as aforesaid, after such deduction as aforesaid, within six months &c. it is ordered and decreed that the plaintiff do re-convey &c. and deliver on oath all deeds &c. unto the defendant, or as he shall direct. But in default of the said defendants paying unto the plaintiff what &c. it is ordered and decreed, that the said defendant do from henceforth stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in case of such foreclosure, it is ordered and decreed that the defendant do surrender the copyhold mortgaged premises to the plaintiff, or as he shall direct, and such surrender is to be at the expense of the defendant. *Hill v. Price*, 26th January, 1761. Reg. Lib. A. 1760. fol. 116. S. C. 1 Dick. 344.

NOTE.

(1) See Decree for Foreclosure, No. I. Note (1). *ante.*

No. VIII.

DECREE FOR FORECLOSURE AGAINST MORTGAGOR AND SECOND MORTGAGEE.

[The plaintiffs were the executor and executrix of the first mortgagee. The defendant Meriton was a second mortgagee. The defendants the Colliers were the mortgagors. The defendant Meriton submitted, by his answer, that in case the defendants the Colliers should not redeem, the mortgaged premises should be sold.]

His Honour doth think fit and so order and decree, that it be referred to Mr. S. one &c. to compute what is due to the plaintiffs for principal and interest on their mortgage, and to tax &c. And upon the defendant Henry Meriton, his paying unto the said plaintiffs what &c. within six months after the said Master shall have made his report, at such time &c. it is ordered and decreed, that the said plaintiffs do assign the said mortgaged premises free &c. and do deliver up all deeds &c. to the said defendant Henry Meriton, or to whom he shall appoint. But in default of the said defendant Henry Meriton his paying &c. it is ordered and decreed, that the said defendant Henry Meriton do from thenceforth stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in case of such foreclosure it is ordered and decreed, that the said Master do compute what is due to the plaintiffs for subsequent interest on their mortgage, and do tax them their subsequent costs. And upon the said defendants Margaret Collier and Arthur Collier their paying unto the plaintiffs what &c. within three months (1) after the said Master shall have made his subsequent report, at such time &c. it is ordered and decreed, that the said plaintiffs do reassign the said mortgaged premises free &c. and do deliver up all deeds &c. to the said defendants Arthur Collier and Margaret Collier, or to whom they shall appoint. But in default of the said defendants Arthur Collier and Margaret Collier, their paying unto the said plaintiffs such principal, interest, and costs as aforesaid, it is ordered and decreed, that the said defendants Arthur and

Margaret Collier do from thenceforth stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] But in case the said defendant Henry Meriton shall redeem the said plaintiffs, then it is ordered and decreed, that the said Master do compute what is due to the said defendant Henry Meriton for principal and interest on his mortgage, and tax him his costs of this suit; and do also compute interest for what the said defendant Henry Meriton shall so pay unto the plaintiffs for principal, interest, and costs as aforesaid. And upon the said defendants Arthur Collier and Margaret Collier their paying unto the said defendant Henry Meriton what shall be so reported due to him for principal, interest, and costs in his mortgage as aforesaid, together with what he shall so pay unto the plaintiffs as aforesaid, with interest for the same, within three months (1) after the said Master shall have made his subsequent report, at such time &c. it is ordered and decreed, that the said defendant Henry Meriton do convey and assign the said mortgaged premises free &c. and do deliver up all deeds &c. to the said defendants Arthur Collier and Margaret Collier, or to whom they shall appoint. But in default of the said defendants Arthur and Margaret Collier, their paying unto the said defendant Henry Meriton such principal, interest, and costs as aforesaid, by the time aforesaid, then the said defendant Henry Meriton is to be at liberty to apply to the Court to have the said mortgaged premises sold. And for the better closing of the accounts aforesaid all parties are to produce &c. [See Usual Directions, No. II. *ante.*] *Smyth v. Collier*, M. R. 10th July, 1747. Reg. Lib. B. 1746. fol. 487.

NOTE.

(1) See Decree for successive Foreclosures, No. IX. *post.*

No. IX.

DECREE FOR SUCCESSIVE FORECLOSURES.

[The plaintiff was a mortgagee. The defendant Lougher was a mortgagee subsequent to the plaintiff, but denied notice. The defendant Durrant was also a mortgagee subsequent to the plaintiff. The defendant Spore was the heir at law of the mortgagor. The defendant Blowers claimed to be a purchaser of the mortgaged premises.

The plaintiff offering to redeem Lougher, the right of redemption is given to the defendants in the following order (on payment of what should be found due to plaintiff, and what should be paid by him to Lougher):—

1. To Durrant; and in default,
2. To Spore; and in default,
3. To Blowers; and in default, each is foreclosed.

If Durrant redeemed, the right of redemption is given (on payment of what should be found due to Durrant, and what should be paid by him to the plaintiff):—

1. To Spore; and in default,
2. To Blowers; and in default, each is foreclosed.

If Spore redeemed, to Blowers; and in default, foreclosure. (1)]

[*Inter alia*] And the plaintiff now submitting to redeem the said defendant, Mary Lougher, his Lordship doth think fit, and so order and decree that it be referred to Mr. H. one &c. to take an account of what is due to the said defendant Mary Lougher for principal and interest on her mortgage, and to tax her her costs of this suit. And upon payment by the plaintiff to the said defendant Mary Lougher, of what shall be found due to her for principal, interest, and costs, at such time and place as &c. within six months after the said Master shall have made his report, it is ordered and decreed that the said defendant Mary Lougher do convey and assign the premises comprised in her mortgage to the plaintiff, or such person as he shall appoint, free &c. and do deliver to the plaintiff upon oath, all deeds &c. [See Decree for Redemption,

No. IV. *ante.*] But in default of the said plaintiffs paying the said defendant Mary Lougher, what the said Master shall certify to be due to her for principal, interest, and cost, as aforesaid, by the time aforesaid, then it is ordered that the plaintiff's bill do from thenceforth stand dismissed out of this court with costs, to be taxed by the said Master. But in case the plaintiff shall redeem the said defendant Mary Lougher, then the said Master is to carry on interest for what the plaintiff shall so pay to the said defendant Mary Lougher, for her principal, interest, and costs, and the said Master is also to take an account of what is due to the plaintiff for principal and interest on his mortgage dated the 15th of March, 1727, and tax him his costs of this suit. And upon payment by the said defendant Davy Durrant, to the plaintiff, of what he shall so pay to the said defendant Mary Lougher, together with the subsequent interest, and also what shall be found due to the plaintiff for principal and interest on his mortgage and his costs of this suit as aforesaid, at such time &c. within three months (2) after the said Master shall have made his subsequent report, it is ordered and decreed that the said plaintiff do convey and assign the mortgaged premises to the said defendant Davy Durrant, or to whom he shall appoint, free &c. and do deliver to the said defendant Davy Durrant upon oath, all deeds &c. But in case the said defendant Davy Durrant shall make default in payment of what the plaintiff shall so pay to the said defendant Mary Lougher for principal, interest, and costs, together with interest for the same, and also what shall be found due to the plaintiff for principal, interest, and costs, as aforesaid, by the time aforesaid, then it is ordered and decreed that the said defendant Davy Durrant do from henceforth stand absolutely foreclosed, &c. [See Decree for Foreclosure, No. I. *ante.*] And in that case the said Master is to compute subsequent interest and tax the plaintiff's subsequent costs. And upon payment of what shall be so reported due to the plaintiff for the whole of his principal, interest, and costs, by the said defendant Robert Spore, at such time &c. within (2) three months after the said Master shall have made his subsequent report, it is

ordered and decreed that the plaintiff do convey and assign the said mortgaged premises to the said defendant Robert Spore, or to whom he shall appoint, free &c. and do deliver over all deeds &c. to the said defendant Robert Spore. But in case the said defendant Robert Spore shall make default in payment of what shall be reported due to the plaintiff for principal, interest, and costs as aforesaid, by the time aforesaid, then the said defendant Robert Spore is from thenceforth to stand absolutely foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in that case the said Master is to compute the plaintiff's subsequent interest, and tax his subsequent costs. And upon payment of what shall be so reported due to the plaintiff for the whole of his principal, interest, and costs as aforesaid, by the defendant Isaac Blowers, at such time &c. within three months (2) after the said Master shall have made his subsequent report, it is ordered and decreed that the plaintiff do convey and assign the mortgaged premises to the said defendant Isaac Blowers, or to whom he shall appoint, free &c. and that the plaintiff do deliver to the said defendant Isaac Blowers, all the deeds &c. But in default of the said defendant Isaac Blowers his payment of what the said Master shall certify to be due to the plaintiff, for principal, interest, and costs as aforesaid, by the time aforesaid, then the said Isaac Blowers is from thenceforth to stand absolutely foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] But in case the said defendant Davy Durrant shall redeem the said mortgaged premises, the said Master is to compute interest upon what the said defendant Davy Durrant shall pay to the plaintiff for principal, interest, and costs as aforesaid, and also to take an account of what is due to the said defendant Davy Durrant, for principal and interest on his mortgage, and tax him costs. And upon payment by the said defendant Robert Spore, to the said defendant Durrant, of what he shall have so paid to the plaintiff, for principal, interest, and costs as aforesaid, with interest for the same as aforesaid, and also of what shall be found due to the said defendant Davy Durrant, for his principal, interest and costs

at such time &c., within three months (2) after the said Master shall have made his subsequent report, it is ordered and decreed, that the said defendant Davy Durrant do convey and assign the mortgaged premises to the said defendant Robert Spore, or to whom he shall appoint, free &c., and do deliver to the said defendant Robert Spore, upon oath, all deeds &c. But in default of the said defendant Robert Spore, his payment of what the said Master shall certify to be due to the said defendant Davy Durrant, for principal, interest, and costs as aforesaid, by the time aforesaid, then the said defendant Robert Spore, is from thenceforth to stand absolutely foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in that case it is ordered, that the said Master do compute the said defendant Davy Durrant's subsequent interest, and tax the said defendant his subsequent costs. And upon payment by the said defendant Isaac Blowers, to the said defendant Davy Durrant, of the whole that shall be reported due to the said defendant Davy Durrant, for principal interest, and costs, at such time &c. within three months (2) after the said Master shall have made his subsequent report, it is ordered and decreed, that the said defendant Davy Durrant do convey and assign the said mortgaged premises to the said defendant Isaac Blowers, or to whom he shall appoint, free &c. and do deliver to the said defendant Isaac Blowers, upon oath, all deeds, &c. But in default of the said defendant Isaac Blowers, his payment of what the said Master shall certify to be due to the said defendant Davy Durrant, for principal, interest, and costs as aforesaid, by the time aforesaid, then the said defendant Isaac Blowers is from thenceforth to stand absolutely foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in case the said defendant, Robert Spore, shall redeem the said mortgaged premises, according to any of the directions aforesaid, it is ordered and decreed that the said Master do compute interest upon what the said defendant Robert Spore shall have paid for principal, interest, and costs on account of the mortgage to the defendant Mary Lougher, and tax him his costs in respect thereof.

And upon payment by the said defendant Isaac Blowers of what shall have been so paid by the said defendant Robert Spore for principal, interest and costs on account of the said defendant Mary Lougher's mortgage (3), and of his costs in respect thereof to be taxed by the said Master, and interest, it is ordered that the said defendant Robert Spore do convey all the premises comprised in the said mortgage to the said defendant Mary Lougher, to the said defendant Isaac Blowers or to whom he shall appoint, free &c. and do deliver to the said defendant Isaac Blowers upon oath, all deeds &c. But in default of payment by the said defendant Isaac Blowers to the said defendant Robert Spore of what shall be reported due to the said defendant Robert Spore for principal, interest and costs in respect of the mortgage to the said defendant Mary Lougher as aforesaid, by the time aforesaid, then the said defendant Isaac Blowers is from thenceforth to stand foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And for the better taking the said accounts &c. [See Usual Directions, No. II. *ante.*] *Denny v. Blowers*, L. C. 12th July, 1745, Reg. Lib. A. 1744. fol. 569.

For minutes of same decree. See 2 Newl. Pract. 341.

NOTES.

(1) *Decrees for successive Redemptions.*

The following seems to be the usual form of decrees where parties are entitled to successive rights of redemption :—

Suppose A to be the first mortgagee, and B, C, and D to have successive rights of redemption, the right of redeeming A is given, in the first place, to B, C, and D in succession, each in default of the other.

Supposing B to redeem, the right of redeeming A and B is given, in the next place, to C and D in succession, each in default of the other.

Supposing C to redeem in either of the above cases, the right of redeeming A and C in the former, or A, B, and C in the latter, is lastly given to D.

In default of redeeming, each party is foreclosed if defendant ; or if plaintiff, the bill is dismissed.

In *Smyth v. Collier*, No. VIII. *ante*, the decree coincides with the above form.

In *Denny v. Blowers*, *supra*, the decree coincides with the above form, substituting A for the plaintiff and the defendant Lougher, whom he agreed to redeem; B for the defendant Durrant; C for the defendant Spore; and D for the defendant Blowers.

That where parties are successively entitled under a will, successive redemptions will not be directed. See *Aynsley v. Reed*, No. XIII. *post*.

(2) *Time allowed for successive Redemptions.*

In *Draper v. Earl of Clarendon*, Michaelmas, 1705. Reg. Lib. A. 1705. fol. 97. S. C. 2 Vern. 518. each of the parties to whom the right of redemption was given successively was allowed six months from the default of the preceding party. But in later cases, where successive redemptions have been decreed, six months are given to the party first entitled, and three months each to the succeeding ones. *Smyth v. Collier*, No. VIII. *ante*. *Denny v. Blowers*, *supra*. *Sambroke v. Hanbury*, No. X. *post*. *Dalton v. Wilson*, No. XI. *post*. *Kenner v. Goulston*, No. XII. *post*. *Hill v. Davis*, L. C. 10th July, 1736. Reg. Lib. A. 1737. fol. 790. S. C. (*Hill v. Mawle*), 1 West, 451.

(3) The ultimate redemption is given to the defendant Blowers, on payment of what should be paid by the defendant Spore to the defendant Lougher only. But it seems that it should have been on payment of what should be paid by him "according to any of the directions aforesaid."

No. X.

DECREE FOR FORECLOSURE WHERE PLAINTIFF ENTITLED TO EQUITY OF REDEMPTION IN A PART.

[The plaintiff was first mortgagee, and entitled to the equity of redemption in one-fourth. The defendant Hollingworth was second mortgagee. The defendant Hanbury was entitled to the equity of redemption in three-fourths. The decree is that the defendant Hollingworth shall redeem the plaintiff; in default, that the defendant Hanbury shall redeem the plaintiff as to three-fourths. If the defendant Hollingworth redeemed the plaintiff, the defendant Hanbury is to redeem her as to three-fourths, and the plaintiff as to one-fourth. In default, the defendant Hanbury is to be foreclosed, and the plaintiff's bill dismissed. (1)]

His Honour doth think fit and so order and decree that it be referred to Mr. M. one &c. to compute what is due to the plaintiff for principal and interest on her mortgage for £2000, and tax her her costs both at law (2) and in this Court. And it is ordered that the plaintiff do come to an account before the said Master for the rents and profits of the mortgaged premises received by her or by any other person &c. [See Decree for Redemption, No. IV. *ante.*] And it is ordered and decreed, that what upon the balance of the said account shall appear to have been, or might have been so received by the said plaintiff of the said rents and profits without her wilful default as aforesaid, be deducted out of what shall be reported due to her for principal, interest and costs, as aforesaid. And upon the defendant Elizabeth Hollingworth her paying unto the plaintiff what shall be remaining due to her for such principal, interest and costs as aforesaid, after such deductions made thereout as aforesaid, within six months after the said Master shall have made his report, at such time &c. it is ordered and decreed that the said plaintiff do assign her securities and convey the whole mortgaged premises unto the said defendant Elizabeth Hollingworth, subject to the plaintiff's right of redeeming the undivided fourth of the said mortgaged premises as hereafter directed, free &c. and do deliver up all deeds &c. to the said defendant Elizabeth Hollingworth or to whom she shall appoint. But in default of the said defendant Elizabeth Hollingworth her paying unto the plaintiff such principal, interest and costs as aforesaid, by the time aforesaid, the said defendant Elizabeth Hollingworth is from thenceforth to stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in case of such foreclosure, it is further ordered and decreed that the said Master do compute subsequent interest on what shall be reported due to the plaintiff as aforesaid, and tax her her subsequent costs and carry on the subsequent account of rents and profits. And upon the defendant Thomas Hanbury his paying unto the plaintiff what the said Master shall certify to be due to her for such principal, interest and costs as aforesaid, within three months (3)

after the said Master shall have made his subsequent report at such time &c. it is ordered and decreed that the said plaintiff do re-convey to the said defendant Thomas Hanbury three undivided fourths of the said mortgaged premises, free &c. and do deliver up all deeds &c. to the said defendant Hanbury, or to whom he shall appoint. But in default of the said defendant Thomas Hanbury his paying unto the said plaintiff such principal, interest and costs as aforesaid, by the time aforesaid, the said defendant Thomas Hanbury is from thenceforth to stand absolutely debarred and foreclosed, &c. [See Decree for Foreclosure, No. I. *ante.*] But in case the defendant Elizabeth Hollingworth shall redeem the plaintiff as aforesaid, by the time aforesaid, then it is ordered and decreed, that the said Master do compute subsequent interest on what the said defendant Elizabeth Hollingworth shall so pay to the plaintiff, and likewise take an account of what is due to the said defendant Elizabeth Hollingworth for principal and interest on her mortgage for 500*l.*, and tax her her costs of this suit. And upon the defendant Thomas Hanbury his paying unto the said defendant Elizabeth Hollingworth three fourths of what the said Master shall certify to be due to her for principal, interest, and costs, and upon the plaintiffs paying unto the said defendant Elizabeth Hollingworth the remaining fourth of such principal, interest, and costs, within three months (3) after the said Master shall have made his further report, at such time &c. it is ordered and decreed, that the said defendant Elizabeth Hollingworth do reconvey the said three undivided fourths of the said mortgaged premises to the defendant Thomas Hanbury, and the remaining fourth to the plaintiff, free &c. and do deliver up all deeds &c. to the said defendant Thomas Hanbury and the said plaintiff, or to whom they shall appoint. But in default of the said defendant Thomas Hanbury's paying unto the said defendant Elizabeth Hollingworth such three-fourths as aforesaid, by the time aforesaid, the said defendant Thomas Hanbury is from thenceforth to stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in default of the said plaintiffs paying unto the said defendant Elizabeth Hollingworth such remaining fourth as

aforesaid, by the time aforesaid, the plaintiff's bill in respect of the said remaining fourth is from thenceforth to stand dismissed out of this Court. And for the better taking the several accounts &c. [See Usual Directions, No. II. *ante.*] *Sambroke v. Hanbury*, M. R. 30th November, 1751. Reg. Lib. B. 1751. fol. 109.

NOTES.

(1) See Decree for successive Foreclosures, No. IX. Note (1), *ante.*

In this case, the decree coincides with the form there suggested, substituting A for the plaintiff in his character of mortgagee, B for the defendant Hollingworth, C for the defendant Hanbury together with the plaintiff in his character of mortgagor.

(2) See Decree for Foreclosure, No. I. Note (1), *ante.*

(3) See Time allowed for successive Redemptions, No. IX. Note (2). *ante.*

No. XI.

**DECREE FOR FORECLOSURE, ON BILL BY
DERIVATIVE MORTGAGEE.**

[The defendant Wilson was the mortgagor, the defendant Hodgson the mortgagee, and the plaintiff a derivative mortgagee from the defendant Hodgson. The decree is that the defendant Wilson shall redeem both, or be foreclosed; and, in the latter event, that the defendant Hodgson shall redeem the plaintiff, or be foreclosed. (1)]

His Honour doth think fit, and so order and decree, that the plaintiff's bill be taken *pro confesso* against the defendant Thomas Wilson. And that it be referred to Mr. S. one &c. to take an account of what is due to the defendant Hodgson, for principal and interest on his mortgage, and to tax him his costs of this suit; and that the said defendant Hodgson, do come to an account before the said Master for the rents and profits of the mortgaged premises received by him or any other person &c. [See Decrees for Redemption, No. IV. *ante.*] And what, upon balance of the said account, shall appear to have been, or might have been so received by the said defendant Hodgson, of the said rents and profits, without his wilful default as aforesaid, is to be deducted out of what shall be found

due to him for principal, interest, and costs as aforesaid. And the said Master is also to take an account of what is due to the plaintiff for principal and interest in his derivative mortgage, and to tax him his costs, both at law (2) and in this court; and the plaintiff is to come to an account before the said Master for the rents and profits of the said mortgaged premises received by him or by any other person &c. [See Decree for Redemption, No. IV. *ante.*] And what shall appear to be the balance of that account is to be deducted out of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid. And upon the defendant Wilson's paying unto the plaintiff what shall be then remaining due to him for such principal, interest, and costs as aforesaid, not exceeding what shall be found due to the defendant Hodgson, for principal, interest, and costs on his mortgage, and the residue, if any, of what shall remain due on the defendant Hodgson's mortgage, unto the said defendant Hodgson, within six months after the said Master shall have made his report, at such time &c. it is ordered and decreed, that the plaintiff and the defendant Hodgson do reconvey the mortgaged premises, free &c. and do deliver up all deeds &c. to the defenants, or as they shall direct. But in default of the defendant Wilson's paying unto the plaintiff and the defendant Hodgson, such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed, that the said defendant Wilson do from thenceforth stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And in case of such foreclosure it is ordered, that it be referred to the Master to compute subsequent interest on the plaintiff's derivative mortgage, and to tax him his subsequent costs; and the said Master is to take the subsequent account of rents and profits received by the plaintiff, or by any other person &c. [See Decree for Redemption, No. IV. *ante.*] And the balance on account of such rents and profits is to be deducted out of what the Master shall find to be due to the plaintiffs for principal, interest, and costs. And upon the defendant Hodgson's paying to the plaintiff what shall be

found to remain due to him for his principal, interest, and costs as aforesaid, within three months (3) after the said Master shall have made his subsequent report, at such time &c. it is ordered and decreed, that the plaintiff do reconvey the mortgaged premises, free &c. and deliver on oath all deeds &c. unto the defendant Hodgson, or to whom he shall appoint. But in default of the said defendant Hodgson's paying unto the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered and decreed, that the said defendant do from thenceforth stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And for the better taking of the said accounts &c. [See Usual Directions, No. II. *ante.*] Dalton v. Wilson, M. R. 30th May 1750. Reg. Lib. A. 1749. fol. 617.

For minutes of same decree. See 2 Newl. Pract. 345.

NOTES.

(1) See Decree for successive Foreclosures, No. IX. Note (1), *ante.*

In this case, the decree does not coincide with the form there suggested; but the bill was taken *pro confesso* against the mortgagor.

(2) See Decree for Foreclosure, No. I. Note (1), *ante.*

(3) See Time allowed for successive Redemptions, No. IX. Note II. *ante.*

No. XII.

DECREE FOR REDEMPTION ON BILL BY
JUDGMENT CREDITOR, WITH FORE-
CLOSURE OVER. (1)

[*Inter alia*] His Lordship doth think fit, and so order and decree, that it be referred to Mr. E. one &c. to take an account of what is due to the said defendant Hill, for principal and interest on his said mortgages, and to tax him his costs of this suit. And that, upon payment by the plaintiffs of what the said Master shall certify to be due to said defendant Hill, for such principal, interest, and costs, within six months after said Master shall have made his report at such time &c. the said defendant Hill do convey and assign the said mort-

gaged premises to the plaintiff Coulston, or to such other person as the said Christian Kenner shall appoint, in trust for her the said plaintiff, Christian Kenner, free &c. and all proper parties are to join therein, as the said Master shall direct; and the said defendant Hill is to deliver up to the plaintiffs, upon oath, all deeds &c. But in default of the plaintiff's payment of what the said Master shall certify to be due to the said defendant Hill for such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered, that the plaintiff's bill do from thenceforth stand dismissed &c. [See Decree for Redemption, No. IV. *ante*.] And in case the plaintiffs shall pay unto the said defendant Hill what the said Master shall certify to be due to him for his principal, interest, and costs within the time aforesaid, then it is hereby referred to the said Master to take an account of what is due to the said plaintiff Kenner on the said judgment obtained by her in the name of the other plaintiff Coulston, her trustee, against the said defendant Goulston, and to tax the plaintiffs their costs at law and in this court. And it is ordered and decreed that the said defendant Goulston do pay unto the plaintiff Coulston, or such other person or persons as the plaintiff Kenner shall direct, what the said Master shall find due to the plaintiff Kenner on her said judgment, and to the plaintiffs, for their said costs, and likewise what the plaintiffs shall so pay to the said defendant Hill, for principal, interest, and costs as aforesaid, together with interest for the same, to be computed by the said Master from the time of payment thereof, within three months (2) after the plaintiffs shall redeem the said defendant Hill as aforesaid, at such time &c. and that thereupon the plaintiffs do convey and assign the said mortgaged premises and judgment to the said defendant Goulston, or to such person or persons as he shall direct, free &c.; and all proper parties are to join therein as the said Master shall direct; and the plaintiffs are, upon oath, to deliver up to the said defendant Goulston all the deeds &c. But in default of the said defendant Goulston's payment unto the plaintiff Coulston, or such other person or persons as the

plaintiff Kenner shall direct, of what the said Master shall certify to be due to the plaintiff Kenner, on the said judgment, and to the plaintiffs for their said costs, as also what the plaintiffs shall pay to the said defendant Hill for principal, interest, and costs, together with interest for the same as aforesaid, to be computed, at such time and place as aforesaid, it is ordered and decreed, that the said defendant Goulston do from thenceforth stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante*.] And it is hereby referred to the said Master to settle the said conveyances and assignments, in case the parties differ about the same. And for the better taking the accounts &c. [See Usual Directions, No. II. *ante*.] *Kenner v. Goulston*, L. C. 28th January, 1741. Reg. Lib. A. 1742. fol. 345.

For same decree, see 2 Newl. Pract. 339.

NOTES.

(1) See Decree for successive Foreclosures, No. IX. Note (1), *ante*.

In this case, the decree does not coincide with the form there suggested; but the judgment creditor had no right to call upon the mortgagor to redeem him in default of the mortgagee, and only acquired that right by redeeming the mortgage.

Redemption by Judgment Creditor.

A single judgment creditor coming into equity for the purpose of redeeming a mortgage is entitled to redeem the entirety. See *Kenner v. Goulston*, *supra*. *Stonehewer v. Thomson*, 2 Atk. 440. And see Decree in *Stileman v. Ashdown*, Ambl. 14. *King v. Marissal*, 3 Atk. 192. *Sharpe v. Earl of Scarborough*, 4 Ves. 542. And he may at the same time obtain a decree for foreclosure against the mortgagor. *Kenner v. Goulston*, *supra*. Or, in case of the death of the mortgagor, for a sale. See Decree in *Stileman v. Ashdown*, *supra*. And see Decree for Sale, No. XIV. *post*. But before he can redeem a mortgage of leasehold, he must take out execution. *Shirley v. Watts*, 3 Atk. 200. *King v. Marissal*, *supra*.

(2) See Time allowed for successive Redemptions, No. IX. Note (2), *ante*.

No. XIII.

**DECREE FOR REDEMPTION ON BILL FOR
EXECUTION OF TRUSTS OF WILL (1).**

[The plaintiff and the defendants, Mary Davison, Ann Tweddell, Francis Tweddell, and George Tweddell, were tenants for life successively under the will. The decree does not give them successive periods for redemption.]

[*Inter alia*] His Lordship doth declare that the will and codicil of the said John Aynsley the elder, the testator, being admitted by the plaintiff the heir at law, the same ought to be established &c. [See Decrees respecting Real Assets, No. II. *ante*.] And that it be referred to Mr. S. one &c. to take an account of what is due to the defendants Rhoda Delaval and Elisha Biscoe as executors of Francis Blake Delaval deceased, for principal and interest on the mortgage in question, and to tax them their costs of this suit, and likewise to tax the costs of the defendant Francis Blake Delaval the heir at law of the mortgagee. And upon payment of what shall be found due to the said defendants Rhoda Delaval and Elisha Biscoe the executors, for principal, interest and costs as aforesaid, and to the said defendant Francis Blake Delaval the heir at law, for his costs, by the plaintiff or the defendants Mary Davison, Ann Tweddell, Francis Tweddell and George Tweddell, or any of them, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, the said defendants Rhoda Delaval and Elisha Biscoe the executors, and Francis Blake Delaval the heir at law, are to assign the said mortgage and reconvey the said mortgaged premises, free &c. and deliver up all deeds &c. to the said plaintiff or to the said defendants Mary Davison, Ann Tweddell, Francis Tweddell and George Tweddell, or such of them as shall so redeem as aforesaid, or to such person as he or they shall appoint. And in default of the plaintiffs or the said defendants Mary Davison, Ann Tweddell, Francis Tweddell and George Tweddell, or any of them paying to the said defendants Rhoda Delaval,

Elisha Biscoe and Francis Blake Delaval such principal, interest, and costs as aforesaid, by the time aforesaid, the said plaintiff's bill, as against the said defendants Rhoda Delaval, Elisha Biscoe and Francis Blake Delaval is from thenceforth to stand dismissed &c. [See Decree for Redemption, No. IV. *ante.*] And the defendants Mary Davison, Ann Tweddell, Francis Tweddell and George Tweddell are from thenceforth to stand foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] But in case the plaintiff or the said defendants Mary Davison, Ann Tweddell, Francis Tweddell and George Tweddell, or any of them, shall redeem as aforesaid, then the equity of redemption of the said mortgaged premises is, in the hands of such of them so redeeming as aforesaid, to be subject and liable to such trusts and limitations as are declared and limited by the said testator's will concerning the same. And it is further ordered, that it be referred to the said Master to take an account of the personal estate of the said testator John Aynsley not specifically bequeathed, which hath been received by the plaintiff, or by any other person &c. and likewise to take an account of the said testator's debts &c. and compute interest &c. And it is further ordered, that such personal estate be applied in payment of the said testator's debts &c. in a course of administration. And the said Master is likewise to take an account of the rents and profits of the said testator's trust real estate devised to his trustee John Reed, which have accrued since his death, and been received by the plaintiff, or by any other person &c. And it is further ordered, that what shall be coming on the said account of rents and profits be applied in payment of so much of the said testator's debts &c. as his personal estate will not extend to satisfy. And in case any of the said testator's creditors shall exhaust &c. [See Decrees respecting Real Assets, No. IV. *ante.*] And after such redemption of the said testator's estate, it is further ordered, that a settlement be made of the said trust freehold and copyhold estates with the approbation of the said Master, for the benefit of such persons, and to such uses, and with such limitations, and on such trusts, as are

mentioned and declared concerning the same in the said testator's will. And for the better taking of the accounts &c. [See Usual Directions, No. II. *ante.*] And it is further ordered, that the defendants William Armstrong and John Reed be paid their costs of this suit, to be taxed by the said Master out of the trust estate; and that all other parties, to whom costs are not before given, be paid their costs of this suit to this time, to be taxed by the said Master out of the said trust estate. And his Lordship doth reserve the consideration of subsequent costs, and of all further directions, until after &c. [See Usual Directions, No. XV. and XVII. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Aynsley v. Reed*, L. C. 11th February, 1754. Reg. Lib. A. 1753. fol. 565. S. C. 1 Dick. 249.

NOTE.

Decree for Execution of Trusts of Will. Redemption of Mortgage.

A mortgagee cannot be made a party to a suit by the mortgagor or those claiming under him, except for the purpose of redemption. *Drew v. O'Hara*, 2 Ba. & Be. 562. note. And see *Chomley v. Countess of Orford*, 2 Atk. 267. *Aynsley v. Reed*, *supra*. On a bill against a mortgagee, a sale can only be directed by consent. *Troughton v. Binks*, 6 Ves. 575. And see *Decrees respecting Real Assets*, No. VII. and No. XI. *ante*.

To a bill in Ireland by a trustee under the will of the mortgagor against the mortgagee for the execution of the trusts of the will, praying a sale, but not offering to redeem, a demurrer was allowed, notwithstanding the practice in Ireland to direct a sale on a bill by the mortgagee. *M'Donough v. Shewbridge*, 2 Ba. & Be. 555. For further directions as to sale, see *Decree for Sale on Bill by Mortgagee*, No. XIV. *post*.

No. XIV.

**DECREE FOR BILL ON SALE BY MORTGAGEE,
IN THE ADMINISTRATION OF ASSETS.**

[The defendant John Geary, the infant, was the heir at law of the testator. The defendant Elizabeth Geary was devisee of his real estate and his executrix.]

His Honour doth declare the said testator's will and codicil to be well proved &c. [See Decrees respecting Real Assets, No. I. *ante.*] And that it be referred to Mr. E. one &c. to take an account of what is due to the plaintiff for principal money, and interest on his said mortgage, and to tax him his costs of this suit. For the better taking of which accounts &c. [See Usual Directions, No. II. *ante.*] And it is further ordered and decreed, that the lands comprised in the plaintiff's said mortgage be sold &c. [See Usual Directions, No. VI. *ante.*] And out of the money arising by such sale the plaintiff is, in the first place, to be paid what shall be reported due to him for principal, interest, and costs as aforesaid; and in the next place, the defendant the infant is thereout to be paid his costs of this suit, to be taxed by the said Master. And if there shall then remain any surplus thereof, the same is to be paid to the defendant Elizabeth Geary, the executrix of the said testator. But in case the money to arise by the said sale shall not be sufficient for the purposes aforesaid, then his Honour doth declare that the plaintiff is entitled to come in and receive a satisfaction for such deficiency out of the said testator's assets, in a course of administration; and in such case the plaintiff the infant is to be paid his said costs out of the said testator's personal estate. *Geary v. Geary*, M. R. 7th May, 1747. Reg. Lib. A. 1746. fol. 376.

NOTE.

Decree for Sale.

Upon a bill by a mortgagee, where the mortgagor makes default, a sale will be directed instead of a foreclosure. *How v. Viguers*,

1 Ch. Rep. 33. Hall v. Baker, M. R. 19th July, 1747. Reg. Lib. A. 1746. fol. 544.

So upon a decree *pro confesso* against the mortgagor. Dashwood v. Bithazey, Mos. 196.

So upon a bill by the mortgagee for the administration of the assets of the mortgagor, a sale will be directed, and payment of the deficiency out of the assets. Geary v. Geary, *supra*. Daniel v. Skipwith, 2 Bro. 155. And see Harris v. Harris, 3 Atk. 722. Monday v. Monday, 1 V. & B. 223. Bowen v. Prentis, L. C. 9th November, 1747. Reg. Lib. A. 1747. fol. 113.

So where the defendant is an infant, see Decrees respecting Infants, No. VI. *post*.

It seems that in the case of the mortgage of a West India estate, a sale may be directed on a bill by the mortgagee. See what is said by Mr. Bell, in Beckford v. Kemble, 1 S. & S. 15.

That in Ireland a sale is decreed instead of a foreclosure. See Perry v. Barker, 13 Ves. 205.

So in bankruptcy, see Lord Roslyn's order, 8th March, 1794. 2 C. B. L. 290.

Whether, where the security is deficient, a sale may be decreed instead of a foreclosure, *qu.* See Dashwood v. Bithazey, *supra*, and cases there cited. Earl of Kiinnoul v. Money, 3 Swan, 208. note. Coote on Mortgages, p. 513.

In Lucas v. Seale, 2 Atk. 56. it is said, that where an executor is indebted to the testator on mortgage, the other executors may bring a bill for a sale. But no decree will be made until it has been ascertained whether the mortgage is a sufficient security. S. C. 1 West, 556.

In Burney v. Morgan, 1 S. & S. 362. it is said that a mortgagee has no common interest with the creditors at large, and cannot sue on their behalf. But that a mortgagee may sue as a specialty creditor on behalf of himself and others. See Harris v. Harris, *supra*. Bowen v. Prentis, *supra*.

For further as to sale on bill by mortgagee. See Decree on Bill by Equitable Mortgagee, No. XVIII. *post*. And Decree establishing Lien, No. XVI. *post*.

No. XV.

DECREE FOR FORECLOSURE &c. WHERE ONE MORTGAGOR A SURETY.

[The plaintiff and Duncombe were co-trustees, of whom the plaintiff was the survivor. They were entitled to a mortgage from James Whiteley, which was further secured by a mortgage from Joseph Whiteley. The equity of redemption in the first mortgage was vested in the defendant Micklethwaite; and that in the second, in the other defendants. The decree is, that the parties claiming under either mortgagor should redeem or be foreclosed. In case the party claiming under the original mortgagor should redeem, that the plaintiff should reconvey the premises comprised in each mortgage to the parties claiming under each of the mortgagors respectively. But in case the parties claiming under the surety should redeem, that the plaintiff should convey the premises comprised in both mortgages to the parties claiming under the surety.]

This Court doth order and decree, that it be referred to Mr. S. one &c. to take an account of what remains due to the plaintiff for principal and interest, in respect of his mortgage of 2500*l.* in the pleadings mentioned, secured by the several indentures therein set forth, bearing date respectively &c. and to tax the costs of the plaintiff in this court, and at law. And it is ordered, that the said Master do take an account of the rents and profits of the mortgaged premises, comprised in the indenture first stated in the plaintiff's bill, dated &c. received by the plaintiff and the said H. Duncombe, deceased, or either of them, or by any other person &c. [See Decree for Redemption, No. IV. *ante.*] And it is ordered, that what on taking the said accounts shall appear to have been received for the rents and profits of the said mortgaged premises, be deducted from what the said Master shall find due to the plaintiff, for principal, interest, and costs, as aforesaid. And upon the defendant Thomas Micklethwaite, or the defendants Jonathan Lupton and Obadiah Brook, paying unto the plaintiff what shall be remaining due to him for principal, interest, and costs, as aforesaid, within six

calendar months after the said Master shall have made his report, at such time &c. it is ordered that the plaintiff do convey the mortgaged premises in the manner following, viz. In case the said defendant Thomas Micklethwaite, shall redeem the plaintiff as aforesaid, that the plaintiff do convey the mortgaged premises comprised in the indenture first stated in the plaintiffs bill, bearing date &c., free &c. and deliver up all deeds &c. to the defendant Thomas Micklethwaite, or as he shall appoint. And it is ordered, that the defendant do also convey the mortgaged premises comprised in the indenture secondly stated in the plaintiff's bill, bearing date &c., free &c. and deliver up all deeds &c. to the said defendants Jonathan Lupton and Obadiah Brook, or as they shall appoint. But in case the said defendants, Jonathan Lupton and Obadiah Brook, shall redeem the plaintiff as aforesaid, then it is ordered that the plaintiff do convey the mortgaged premises comprised in each of the said several indentures of &c. free &c. and deliver up all deeds &c. to the defendants Thomas Lupton and Obadiah Brook, or as &c. But in default of the defendant Thomas Micklethwaite, or the defendants Jonathan Lupton and Obadiah Brook, paying unto the plaintiff what shall be remaining due to him for principal, interest, and costs as aforesaid, by the time aforesaid, the said defendants are from thenceforth to stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] and for better taking the said accounts &c. [See Usual Directions, No. II. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Becket v. Micklethwaite*, V. C. 26th Janury, 1821. Reg. Lib. A. 1820. fol. 871. S. C. 6 Mad. 199.

NOTE.

This decree was directed by the V. C. to be drawn up according to a precedent settled by himself. See the report of the case.

No. XVI.

DECREE ESTABLISHING LIEN ON REAL ESTATES.

[*Inter alia*] His Lordship doth declare that the plaintiff has a lien upon the reversion of the said freehold, copyhold, and leasehold estates for the money paid by the plaintiff to John Manners or his representatives, in discharge of the several bonds entered into by him and John Martindale in the bill named, bearing date &c. to the said John Manners, and doth order and decree the same accordingly. And it is ordered that it be referred to Mr. P. one &c. to take an account of what is due to the plaintiff for principal and interest of the money so paid by the plaintiff in satisfaction and discharge of the said bonds. And it is ordered that the defendant do pay to the plaintiff what shall be reported due to him within one month after the Master shall have made his report. And in case the defendant shall not pay to the plaintiff what shall be reported due to him on the said account within the time so limited for the payment thereof, it is ordered that the money which shall be so reported due to the plaintiff be raised by mortgage or sale of the said freehold, leasehold, and copyhold estates, with the approbation of the said Master and as he shall direct; and in case the said money shall be raised by sale, it is to be to the best purchaser &c.; and all proper parties are to join in such mortgage or sale as &c. and are to produce &c. [See Usual Directions, No. VI. *ante.*] And it is ordered that the money to be raised be paid into the Bank in the name and with the privity &c. [See Usual Directions, No. X. *ante.*] And it is ordered that the money so to be raised be applied in payment of what shall be found due to the plaintiff as aforesaid. And for the better taking of the accounts before directed &c. [See Usual Directions, No. II. *ante.*] And his Lordship doth not think proper to give costs on either side to the hearing of this cause, but this is to be without prejudice to Sir Robert Mackreth having his subsequent costs as a mortgagee. And his Lordship doth reserve

the consideration of the subsequent costs of this suit and all further directions until after &c. [See Usual Directions, No. XV. and XVII. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Makreth v. Symmons*, L. C. 26th November, 1808. Reg. Lib. B. 1808. fol. 165. S. C. 15 Ves. 329.

No. XVII.

**DECREE FOR FORECLOSURE ON BILL BY
EQUITABLE MORTGAGEE. (1)**

[The original suit was against the mortgagor, and, upon his death, was revived against the defendant Mill, his heir at law. The defendant Arnold was a purchaser with notice.]

His Lordship doth order and decree, that it be referred to Sir W. W. P. one &c. to take an account of what is due to the plaintiff from John Mill, for principal and interest on his securities in the pleadings mentioned, and to tax him his costs of this suit. And it is ordered, that the said Master do also tax the defendant John Mill the infant his costs of the supplemental suit. And it is ordered, that such costs be paid by the plaintiff, and added to his own costs. And upon the defendant Andrew Arnold his paying unto the plaintiff what shall be reported due to him for principal, interest, and costs, and the costs he shall so pay to the defendant John Mill, within six months after &c. at such time and place as &c. it is ordered, that the plaintiff do convey the said premises, free &c. and deliver all deeds and writings &c. to the said defendant Andrew Arnold, or as &c. But in default of the said Andrew Arnold his paying unto the plaintiff what shall be found due to him for principal, interest, and costs as aforesaid, by the time aforesaid, the said defendant is from thenceforth to stand absolutely debarred and foreclosed &c. [See Decree for Foreclosure, No. I. *ante.*] And it is ordered, that he do convey and procure all proper parties to join in conveying the same to the plaintiff and his heirs, or as he shall appoint, free from all incumbrances done by him, or any

claiming by, from, or under him, and deliver on oath all deeds, papers, and writings, in his custody or power relating thereto to the plaintiff, or as he shall appoint. And it is ordered, that the said Master do settle such conveyance. And it is ordered, that the said Andrew Arnold do deliver up possession (2) of the said estates to the plaintiff, or as he shall direct. And for better taking the accounts &c. [See Usual Directions, No. II. *ante.*] And this decree is to be binding on the said defendant John Mill the infant, unless &c. [See Decrees respecting Infants, No. V. *post.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Hiern v. Mill*, L.C. 20th November, 1806. Reg. Lib. A. 1806. fol. 337. S.C. 13 Ves. 114.

NOTES.

(1) *Decree on Bail by Equitable Mortgagee.*

The ordinary decree in a suit by an equitable mortgagee is for a conveyance of the legal estate and a foreclosure. *Hiern v. Mill*, *supra*. And see *Monkhouse v. Corporation of Bedford*, 17 Ves. 380. *Pye v. Daubuz*, 2 Dick. 759. *Edge v. Worthington*, 1 Cox, 213.

But in the case of an equitable mortgage of leasehold estate, a decree may be obtained for a sale. *Smith v. Nelson*, No. XVIII. *post*. And see *Russel v. Russel*, 1 Bro. 270. note.

An equitable mortgagee may obtain a receiver. *Curling v. Lord Leycester*, 19 Ves. 633. *Ex parte Alexander*, 2 G. & J. 277. *Shakel v. Duke of Marlborough*, 4 Mad. 463. And see *Past Rents*, No. I. Note (4), *ante*.

That in bankruptcy on the petition of an equitable mortgagee, a sale will be directed. See *Ex parte Payler*, 16 Ves. 434. *Ex parte Alexander*, *supra*.

(2) Possession will be ordered to be delivered. *Hiern v. Mill*, *supra*. Otherwise in the case of a legal mortgage. See *Decree for Foreclosure*, No. I. Note (4), *ante*.

No. XVIII.

DECREE FOR SALE ON BILL BY EQUITABLE MORTGAGEE.

This Court doth order and decree, that it be referred to Mr. A. one &c. to take an account of what is due to the plaintiff for principal and interest on the sum of 500*l.* in the pleadings mentioned, and to tax the plaintiff his costs of this suit. And it is ordered, that the defendant do pay the plaintiff what the said Master shall find due for principal, interest, and costs as aforesaid, within six months after the said Master shall have made his report, at such time and place as &c. And upon such payment it is ordered, that the plaintiff do deliver up to the defendant the indenture of lease in the pleadings mentioned, dated &c. And in default of the defendant so paying to the plaintiff what shall be found due to him for principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered, that the premises comprised in the said indenture of lease be sold &c. [See Usual Directions, No. VI. *ante.*] And it is ordered, that the money arising by the said sale be paid into the Bank, with the privity &c. [See Usual Directions, No. X. *ante.*] And it is ordered, that the same be applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid. And for the better taking the said account &c. [See Usual Directions, No. II. *ante.*] And this Court doth reserve the consideration of all further directions until after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Smith v. Nelson*, 24th July, 1822. Reg. Lib. B. 1821. fol. 1763.

NOTE.

Upon default, a further order will be made for a sale. S. C. No. XIX. *post.*

No. XIX.

ORDER ON DEFAULT.

His Honour doth order that the premises comprised in the indenture of lease of the &c. be sold, with the approbation of the Master, to whom this cause will stand transferred in the room of the late Mr. A. &c. [See Usual Directions, No. VI. *ante.*] And it is ordered, that the money arising from the said sale be paid into the Bank, with the privity &c. [See Usual Directions, No. X. *ante.*] And it is ordered that it be referred to the said Master to compute subsequent interest on the sum of £500 in the pleadings mentioned, and to tax the petitioner his costs of this suit. And it is ordered that the money so to be paid into the Bank as aforesaid be applied in payment of what has been found due to the petitioner by the said Master for principal, interest and costs, and of what shall further be found due to him for such subsequent interest and costs as aforesaid. *Smith v. Nelson*, M. R. 18th February, 1824. Reg. Lib. B. 1823. fol. 544.

No. XX.

**DECREE FOR REDEMPTION OF GOODS
PLEDGED.**

[The plaintiff was the assignee of William Cordwell, the bankrupt.]

His Lordship doth order and decree that it be referred to Mr. H. one &c. to take an account of what remained due on the &c. the date of the last note exhibited in this cause, for principal and interest of the money advanced and lent by the defendant Westbrooke to the said William Cordwell, the bankrupt, on the pledge of the jewels, plate and effects mentioned in the original note from the defendant to the said William Cordwell, dated &c. and to carry on interest on so much of the principal as remained due. And it is further ordered, that the said Master do likewise take an account of the said jewels, plate, and effects, specified in the last mentioned note, and see which of them remain *in specie*

No. XVIII.

DECREE FOR SALE ON BILL BY EQUITABLE MORTGAGEE.

This Court doth order and decree, that it be referred to Mr. A. one &c. to take an account of what is due to the plaintiff for principal and interest on the sum of 500*l.* in the pleadings mentioned, and to tax the plaintiff his costs of this suit. And it is ordered, that the defendant do pay the plaintiff what the said Master shall find due for principal, interest, and costs as aforesaid, within six months after the said Master shall have made his report, at such time and place as &c. And upon such payment it is ordered, that the plaintiff do deliver up to the defendant the indenture of lease in the pleadings mentioned, dated &c. And in default of the defendant so paying to the plaintiff what shall be found due to him for principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered, that the premises comprised in the said indenture of lease be sold &c. [See Usual Directions, No. VI. *ante.*] And it is ordered, that the money arising by the said sale be paid into the Bank, with the privity &c. [See Usual Directions, No. X. *ante.*] And it is ordered, that the same be applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid. And for the better taking the said account &c. [See Usual Directions, No. II. *ante.*] And this Court doth reserve the consideration of all further directions until after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Smith v. Nelson*, 24th July, 1822. Reg. Lib. B. 1821. fol. 1763.

NOTE.

Upon default, a further order will be made for a sale. S. C. No. XIX. *post*

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Decrees respecting Mortgages.

in the custody or power of the defendant, and what part thereof hath been sold or otherwise disposed of by the defendant. And as to such part thereof as hath been so sold or disposed of, it is further ordered that the said Master do take an account of the real value thereof; and that the value of such part thereof, as hath been so sold or disposed of by the defendant be applied in the first place towards paying the interest, and then towards sinking the principal, of what shall be so found to have been due to the defendant for the money lent or advanced by him as aforesaid. And if upon the balance of the said account, any thing shall be found to remain due to the defendant for principal or interest, then on payment thereof by the plaintiff to the said defendant at such time and place as the said Master shall appoint, it is further ordered that the defendant do deliver to the plaintiff such part of the said jewels, plate, and effects, as shall be found to remain *in specie*. But in default of such payment by the plaintiff to the defendant as aforesaid, it is further ordered that the said plaintiff's bill do from thenceforth stand dismissed out of this court with costs to be taxed by the said Master. And in case it shall appear on the said account that the defendant is overpaid his said principal and interest, then it is further ordered that the said defendant do pay to the plaintiff so much as shall remain due to the plaintiff on the said account, and also to deliver to the plaintiff such part of the said jewels, plate, and effects as shall remain *in specie*, to be applied as part of the personal estate of the bankrupt, for the benefit of the creditors seeking relief under the said commission. And his Lordship doth reserve the consideration of interest of any money that may be found due from the defendant to the plaintiff, in case there shall be any such, and also the consideration of costs, till after the said Master shall have made his report. And for the better taking of the aforesaid accounts &c. [See Usual Directions, No. II. *ante*.]

at liberty to apply &c. [See *nte*.] Kemp v. Westbrook, b. A. 1748. fol. 602. S. C. 149.

See 2 Newl. Pract. 347.

NOTE.

Decree for Redemption of Goods.

A mortgagee of stock is not bound to bring a bill of foreclosure, but may sell it. *Tucker v. Wilson*, 1 P. W. 261. S. C. 1 Bro. P. C. 494. *Kemp v. Westbrook*, *supra*. *Lockwood v. Ewer*, 2 Atk. 303.

It seems that, previous to the sale, notice should be given to the mortgagor. *Tucker v. Wilson*, *supra*.

If the mortgage be of a reversionary interest in stock, a bill should be filed for payment, and in default for a sale. See *Ponten v. Page*, 1 Mad. Chan. 529.

But the mortgagor of stock may bring a bill to redeem. See *Kemp v. Westbrook*, *supra*.

So there are cases in which a decree may be obtained for the redemption of goods pledged. S. C.

And, in case the debt is over-paid, for repayment of the surplus. S. C. *Harrison v. Hart*, Com. Rep. 393.

DECREES FOR PARTITION, AND TO SETTLE BOUNDARIES.

No. I.

DECREE FOR PARTITION.

[*Inter alia*] His Lordship doth order and decree that a partition be made of the honours, manors, lands, tenements and hereditaments comprised in the said articles and act of parliament, (except Montague House,) with the appurtenances in two moieties, between the plaintiffs, and defendants Sir Edward Montagu and the Duchess of Manchester and their son John Montagu the infant. And that a commission or commissions (1) do issue, directed to certain commissioners to be therein named for that purpose ; and if the parties differ about the number of commissions to be issued, or any other matter relating to the issuing of such commission or commissions, the said Master is to settle the same between them. And it is ordered that the said commissioners do respectively make a division of the said honours, manors, lands, tenements and hereditaments, with the appurtenances into two equal moieties, and make the same by metes and bounds (2) where they shall see occasion. And all deeds and writings, court rolls, court books, surveys and muniments relating to the said estates in the custody or power of any of the parties are to be produced before the said commissioners upon oath, as the said commissioners shall direct. And it is further ordered, that the said commissioners do examine witnesses on interrogatories, or otherwise relating to the matters in question as they shall think fit. And that the said commissioners do allot one moiety of the said estate to the plaintiffs, to be enjoyed by them in severalty, according

to the limitations contained in the said articles and act of parliament; and one other moiety thereof to the said defendants Sir Edward Montagu, Isabella, Duchess Dowager of Manchester his wife, and John Montagu the infant, to be enjoyed by them in severalty according to the limitations contained in the said articles and act of parliament. And after such partition shall have been so made, it is further ordered, that the said plaintiffs the Earl and Countess of Cardigan, and the said defendants Sir Edward Montagu and the Duchess of Manchester his wife, do convey (3) such several moieties to each other respectively, to be held in severalty according to the limitations contained in the said articles and act of parliament. And if the parties differ about the conveyances and assurances to be executed for that purpose, the said Master is to settle the same. And any of the parties to the said partition are to be at liberty to apply to the Court for a conveyance from the plaintiff Lord Brudenell and the said defendant John Montagu the infants, when &c. [See Decrees respecting Infants, No. VII. *post.*] And after the commissioners shall have made such partition and returned the same, it is further ordered, that such of the deeds and writings in the custody or power of any of the parties as relate to such part of the premises as shall by such division be allotted to either of the parties alone be delivered to them respectively; and as to those that concern any parts of the premises that shall be so allotted to one of the said parties jointly with those allotted to the other, any of the parties are to be at liberty to apply to the Court for directions concerning the same (4). And it is further ordered, that the costs of the partition (5) before directed, be borne in equal moieties between the plaintiffs the Earl and Countess of Cardigan, and the defendants Sir Edward Montagu and the Duchess of Manchester his wife (6). Earl of Cardigan v. Sir Edward Montagu, L. C. 6th June, 1755. Reg. Lib. A. 1754. fol. 406. S. C. Sugden on Powers, Appendix IX. and referred to by Lord Redesdale, in his opinion in Curzon v. Lister, No. IV. *post.*

For minutes of same decree. See 2 Newl. Pract. 326.

DECREES FOR PARTITION, AND TO SETTLE BOUNDARIES.

No. I.

DECREE FOR PARTITION.

[*Inter alia*] His Lordship doth order and decree that a partition be made of the honours, manors, lands, tenements and hereditaments comprised in the said articles and act of parliament, (except Montague House,) with the appurtenances in two moieties, between the plaintiffs, and defendants Sir Edward Montagu and the Duchess of Manchester and their son John Montagu the infant. And that a commission or commissions (1) do issue, directed to certain commissioners to be therein named for that purpose; and if the parties differ about the number of commissions to be issued, or any other matter relating to the issuing of such commission or commissions, the said Master is to settle the same between them. And it is ordered that the said commissioners do respectively make a division of the said honours, manors, lands, tenements and hereditaments, with the appurtenances into two equal moieties, and make the same by metes and bounds (2) where they shall see occasion. And all deeds and writings, court rolls, court books, surveys and muniments relating to the said estates in the custody or power of any of the parties are to be produced before the said commissioners upon oath, as the said commissioners shall direct. And it is further ordered, that the said commissioners do examine witnesses on interrogatories, or otherwise relating to the matters in question as they shall think fit. And that the said commissioners do allot one moiety of the said estate to the plaintiffs, to be enjoyed by them in severalty, according

to the limitations contained in the said articles and act of parliament; and one other moiety thereof to the said defendants Sir Edward Montagu, Isabella, Duchess Dowager of Manchester his wife, and John Montagu the infant, to be enjoyed by them in severalty according to the limitations contained in the said articles and act of parliament. And after such partition shall have been so made, it is further ordered, that the said plaintiffs the Earl and Countess of Cardigan, and the said defendants Sir Edward Montagu and the Duchess of Manchester his wife, do convey (3) such several moieties to each other respectively, to be held in severalty according to the limitations contained in the said articles and act of parliament. And if the parties differ about the conveyances and assurances to be executed for that purpose, the said Master is to settle the same. And any of the parties to the said partition are to be at liberty to apply to the Court for a conveyance from the plaintiff Lord Brudenell and the said defendant John Montagu the infants, when &c. [See Decrees respecting Infants, No. VII. *post.*] And after the commissioners shall have made such partition and returned the same, it is further ordered, that such of the deeds and writings in the custody or power of any of the parties as relate to such part of the premises as shall by such division be allotted to either of the parties alone be delivered to them respectively; and as to those that concern any parts of the premises that shall be so allotted to one of the said parties jointly with those allotted to the other, any of the parties are to be at liberty to apply to the Court for directions concerning the same (4). And it is further ordered, that the costs of the partition (5) before directed, be borne in equal moieties between the plaintiffs the Earl and Countess of Cardigan, and the defendants Sir Edward Montagu and the Duchess of Manchester his wife (6). Earl of Cardigan v. Sir Edward Montagu, L. C. 6th June, 1755. Reg. Lib. A. 1754. fol. 406. S. C. Sugden on Powers, Appendix IX. and referred to by Lord Redesdale, in his opinion in Curzon v. Lister, No. IV. *post.*

For minutes of same decree. See 2 Newl. Pract. 326.

Decrees for Partition and to settle Boundaries.

upon oath, brought before the said Master as the said Master shall direct; and that such part thereof as belong to the premises that shall be allotted to each of the said parties be delivered to them respectively; and that such of the said deeds and writings as belong as well to the premises that shall be allotted to the plaintiffs, as to those as shall be allotted to the said defendant T. R., do remain with the said Master for their mutual benefit, subject to the further order of this Court, and that such party, at his own expense, be at liberty to have attested copies thereof. *Trodd v. Downes*, L. C. 18th May, 1742. Reg. Lib. B. 1741. fol. 406. S. C. 2 Atk. 304. cited 2 Ves. jun. 568.

APPENDIX (2).

And it is ordered, that the costs of the said partition be borne by the parties, rateably and in proportion to the estates so to be allotted to them. *Green v. Clear*, M. R. 23d November, 1767. Reg. Lib. A. 1767. fol. 53. S. C. cited 2 Ves. jun. 568.

APPENDIX (3).

Direction as to Costs.

And it is further ordered, that the plaintiffs do pay unto the defendant B., the testator's heir at law, his costs of this suit, to be taxed by the said Master, and that those costs be added to the plaintiff's own costs of this suit to this time, to be taxed by the said Master, out of the said testator's estate. And his Lordship doth reserve the consideration of their subsequent costs, until after the said Master shall have made his report. *Trodd v. Downes*, Appendix (1), *supra*.

APPENDIX (4).

Decree for Partition. Reservation of further Directions.

And their Lordships do reserve the consideration of all further directions until after the return of the said commissioners' certificate; and any of the parties are to be at liberty to apply to this Court as there shall be occasion. *Curzon v. Lister*, Lords Commissioners, 8th July, 1783. Reg. Lib. A. 1782. fol. 549.

No. II.

DECREE FOR PARTITION WITH REFERENCE TO ASCERTAIN SHARES. (1)

His Honour doth think fit and so order and decree, that it be referred to Mr. B. one &c. to see what shares the several

defendants are respectively entitled to of the freehold and copyhold estates in question. And it is ordered and decreed, that a commission do issue, directed to certain commissioners to be therein named, to make a partition of the said freehold and copyhold lands between the said defendants, according to the shares the Master shall find they are respectively entitled to. And his Honour doth reserve the consideration of the costs of this suit, and of all further directions, (2) until after the said Master shall have made his report, and the return of the said commission. *Treherne v. Nash*, M. R. 16th March, 1747. Reg. Lib. B. 1746. fol. 143.

NOTES.

(1) Where the interests of the parties are not ascertained a reference will be directed to ascertain them. *Treherne v. Nash*, *supra*. And see *Agar v. Fairfax*, 17 Ves. 533. *Calmady v. Calmady*, and *Duncan v. Howell*, there cited. *Attorney-General v. Hamilton*, 1 Mad. 214.

(2) See Further Directions, No. I. Note (6), *ante*.

No. III.

DIRECTION WHERE SHARES IN SETTLEMENT.

And in case the Master, in making the aforesaid inquiries, shall find that the shares of the said several parties, or any of them, are comprised in any marriage settlements, it is ordered, that the several allotments to be made to them as aforesaid be subject to the uses of the said settlements respectively. *Barker v. Westmoreland*, M. R. 6th July, 1803. Reg. Lib. A. 1804. fol. 993.

No. IV.

COMMISSION OF PARTITION. (1)

George the Third &c. To James Taylor &c. greeting. Whereas by a decree pronounced in our High Court of Chancery, bearing date the 8th day of July 1783, and made upon the hearing of a certain cause, depending in our said Court,

make proper divisions, and to allot the several parts to the different parties according to the decree. To enable the commissioners to do justice in making the division, the commission authorizes them to examine witnesses upon interrogatories to be exhibited to them as they shall think proper, and it requires them to reduce the examinations into writing, and return the certificate of their proceedings in executing the commission, with the depositions of the witnesses, and interrogatories. There is no oath of secrecy required ; and that liberty is given to the commissioners which is expressly given them by the common form of decrees in these cases, of examining witnesses as they shall see occasion. This extended authority seems absolutely necessary for the justice of their proceedings. They are to act as judges ; they examine witnesses to inform their own consciences ; and therefore have a discretion, to what points and what witnesses, they are to examine. They decide upon the evidence given ; and their decision is final, unless the Court sees ground for controlling it. The whole authority of the Court is therefore delegated to them, though subject to appeal. They act as a Court ; and their proceedings ought therefore to be open. The parties or their solicitors should attend them ; should point out what may tend to give the commissioners full information on the subject ; should produce their deeds and other evidence as well written as oral ; should know what evidence is given on both sides ; should be at liberty to cross-examine witnesses under the control of the commissioners ; and take every step necessary to discover the truth, and enable the commissioners to make a proper return. Perhaps for these reasons the commission is an open not a closed commission. The proceedings I apprehend are in every respect analogous to proceedings under writs of partition at the common law, except that the commissioners act in the double situation of sheriff and jury, and that their decision is subject to appeal. The proceedings on writs of partition at common law are certainly open, and the writ expressly requires the attendance of the parties, and that the proceedings should be in their presence, or at least that they should be summoned to attend. The oath of secrecy attempted to be introduced in this commission is borrowed I have no doubt from commissions for the examination of witnesses in causes before hearing. But the nature of the two commissions is totally different. The authority of commissioners for examination of witnesses is merely ministerial ; they are only to take depositions relevant or not relevant,

See Forms of
Writs, Coke's
Entries, 411.B.
412. B. 413.C.
418. A. C.

to be afterwards used by the Court, if the Court judges it proper to use them ; and the points to which the depositions ought to relate are ascertained by the pleadings. The commissioners under a commission of partition on the contrary act judicially ; they are to decide, and for that purpose are to examine witnesses (if they see occasion) on points not ascertained by any pleadings ; no way in issue between the parties ; but such as may arise in the course of an investigation of the value of the property to be divided, and the manner in which a division ought to be made ; points of which the parties cannot be aware beforehand ; which may arise at different times and in different ways in the course of the commissioners' proceedings ; which may last, and in several cases have lasted, several months ; and it is therefore impossible for the commissioners to do justice if they are enjoined to secrecy. The language used in the proposed oath, shews clearly from whence the form is borrowed, and it is absurd when applied to a commission of partition. It binds the commissioners and their clerks to secrecy till publication shall pass by rule or order of the Court ; so that it is an oath of perpetual secrecy ; for publication never passes by rule or order upon a commission of partition. Indeed there is no form whatever used upon the return of a commission of partition more than upon the return of a commission to take an answer, appoint a guardian, and similar commissions. It is opened as soon as delivered at the office by the clerks in court. There is no form of an oath of secrecy to be annexed to a commission, but that which is proposed to be annexed to the intended commission, and which is expressly and recently provided by the Court for another purpose. The examiners have been long sworn not to publish the contents of depositions before publication passes in the cause. But upon commissions for the examination of witnesses in the country, no such oath was required from the commissioners or their clerks. The inconvenience arising from this practice is complained of by Lord Chief Baron Gilbert, For. Rom. 141. . He proposes to remedy the mischief by an order of the Court ; and his editor observes in a note that this has been since done. The order alluded to in this note is of the 9th of February, 1721. It clearly was intended only to remedy the grievance complained of by Gilbert. It refers only to commissions for the examination of witnesses in causes depending in the court, and to the conduct of the commissioners, who are mentioned as disclosing the

Beames, 327.

Decrees for Partition and to settle Boundaries.

evidence before publication passes ; and the order gives the forms of oaths to be annexed to future commissions requiring secrecy till publication passes by rule or order of the Court. This order of the 9th of February, 1721, is the warrant to the clerk in court to annex to commissions for examination of witnesses the oath of secrecy mentioned in the order. He has no warrant for annexing the same oath to any other sort of commission ; and the attempt to annex it to a commission of partition, seems to me an attempt to do that by the mere authority of an under officer which in another case was not thought proper to be done without the express order of the Court. I am, therefore, clearly of opinion, that the oath proposed to be annexed to the intended commission, is in itself improper, and is not warranted by any order of the Court, or indeed by precedent ; for though it is possible that the inattention of agents (to whom this business is now left) may have occasioned the annexing of this oath in some cases to commissions of partition, yet I am persuaded that all commissions made out till within a few years past, when the clerks in court attended to the business, and all recently made out by the most experienced persons, have not the oath annexed. I have inspected more than one commission, and I have particularly attended to one made out by the late Mr. Robinson, whose knowledge of the subject cannot be doubted. There is no oath of secrecy referred to ; and the commission was in a cause strongly litigated ; and was for partition of the vast property of the Montagu family. I have also seen some commissioners' certificates, from which it appears to me clear, that their proceedings were open. I have altered the draft of the commission to make it agreeable to my ideas on the subject, and to the precedent in Harrison and other books. [From a MS. of Mr. Newland.]

See commission
of partition,
2 Newl. Pract.
328.

Further Opinion of Lord Redesdale.

1. The first duty of the commissioners is to ascertain the estates which are the object of the commission. For that purpose they must first look into the bill and answer ; and if from thence they can ascertain the property, they ought to stop there. If they find the descriptions in those instruments such as are not sufficiently accurate to enable them to proceed, they must endeavour to supply the defect in the pleadings by evidence. But the pleadings must still be their guide as to what evidence they shall receive ; for they are to divide the estates in question in the cause, and no others ; any

evidence, therefore, touching estates not in question in the cause, will be irrelevant to the business before the commissioners, and ought to be rejected by them ; except so far as it may be necessary to be given for the purpose of ascertaining what are the estates in question ; and I think it probable that such evidence may be necessary, if there is any confusion or intermixture of boundaries between the estates in question and those not in question. If the commissioners for the plaintiffs propose to receive evidence, touching any matter not relevant to the business before them, the commissioners for the defendant should object to receiving such evidence, and may refuse to sign depositions, if taken, and to annex them to their return. But they should be careful in rejecting evidence, and should rather admit it than reject it, if not clearly irrelevant. I think the depositions on behalf of the different parties should be kept distinct, as in the case of a commission for the examination of witnesses. If the commissioners think proper to ask any questions for their own information, I think they ought to reduce them first into writing, in the form of interrogatories, and return the questions and answers separately, as questions put and answers taken at their instance.

2. The parties must be considered by the commissioners as seized, according to the statement in the bill and admission of the answer, viz. the plaintiffs of one moiety of the estates to be divided. The commissioners have no concern with any of the estates to which the plaintiffs have a sole title. They must consider the plaintiffs' bill as decisive evidence against them, and conclude that the plaintiffs have only a moiety of the estates which the bill prays may be divided ; and I think they ought to reject all evidence to the contrary. It will be proper to attend to the circumstance stated in this question when the conveyance shall be prepared. After the division has been made by the commissioners, a general production of deeds before the execution of the conveyance seems to me advisable. If it cannot be obtained before the commissioners, the production may be compelled under the decree.

3. I think the commissioners would be guilty of very improper conduct if they were to take any evidence of any such compact as is suggested in this question. Cross interrogatories for examination of witnesses must be prepared on the spot, and offered to the commissioners, as occasion shall require. But as to the question of compact or no compact, the defendant must on no account examine or

cross-examine a single witness. If the plaintiff's commissioners shall take any such evidence, it will perhaps be advisable upon their return, to move to suppress such depositions, previously applying to refer the interrogatories which may lead to such evidence for impertinence.

4. I think general evidence may be given of the value of burgage rights, and that the witnesses, to support that general evidence, may give the particular evidence alluded to in this question, as their reasons for attributing extraordinary value to tenements having these rights. It will be proper to show, as far as can be done, the distinct rights belonging to the different kind of burgages, to show the propriety of allotting to each party an equal share of each kind.

Beames, 272.
311.

5. The name of counsel is required by orders of the Court, 29th of April, 1687, and 15th July, 1699; and these orders in terms extend to all interrogatories for examination of witnesses in any cause depending in the Court. But I doubt whether this case is within the rule: for the reason of those orders expressed in the orders themselves, seems to extend only to the common case of examining witnesses before persons who have no discretion in the acceptance or rejection of interrogatories. Here the interrogatories are to extend only to such points as the commissioners see occasion to examine to; and they may reject interrogatories signed by counsel, and suggest others more proper. I therefore think the discretion vested in the commissioners ought, in this case, to be considered as substituted in lieu of the discretion in other cases attributed to counsel under the control of the Court. I think it will not be advisable for the commissioners to let the solicitors for the parties put the questions to the witnesses, though I am not clear whether the parties have not a right to any such assistance, if they think proper to use it.

6. I think the commissioners may examine the witnesses apart from each other, if they have any suspicion of manufactured evidence. But otherwise, I conceive their proceedings must be open, as they act, in a judicial capacity, in the nature of a court; and I conceive the parties and their agents have a particular right to be present, as expressly directed by the writ of partition at common law. I think the commissioners are not bound personally to take the depositions; that is, to write down the answers of the witnesses; and that they may employ clerks to do this part of the business.

But the clerks must act entirely by their direction, and write the substance of what falls from the witnesses in the language the commissioners direct. If any dispute arises as to the evidence given by a witness, the commissioners must agree amongst themselves upon the words of the deposition; and having done so, the deposition taken must be read over to the witness, and ought to be signed by the witness before he is dismissed. This I apprehend to be the common course of proceeding. It is very material in these cases to have commissioners acquainted with the ordinary mode of proceeding.

7. I think if the commissioners cannot agree upon a division and allotment, they must make separate returns. If they can agree on a division, I think they ought to decide to which party each share should be given by lot. Any offer tending to show a fairness of intention in the defendant's commissioners they may state in their return; and if they are reduced to the necessity of making a separate division of the property, I think it will be highly proper to offer to the plaintiff's commissioners their choice of the lots; and if this offer is not accepted, to call in some indifferent person, and require that person to draw lots for the shares. Nothing, to my mind, can be more fair than such a proceeding; and I think the commissioners ought to state the whole transaction in the return.

8. Where the proceedings are closed if the commissioners disagree as to the return, and consequently prepare two certificates, both ought to be annexed to the commission. The commission itself ought to be produced to the commissioners when they meet, and remain with them till their proceedings are closed, and the return annexed. I think a refusal on the part of the plaintiff's commissioners to annex, or any attempt to prevent the defendant's commissioners from annexing, their certificate to the commission would be grossly improper, and would merit and receive the animadversion of the court. Upon the whole, I cannot but advise the persons concerned for the defendants to endeavor if possible, to avoid disputes between the commissioners. They should first attempt to settle by agreement the property to be divided, and then to settle the division to be made. If the proceedings are to be throughout adverse, the expense must be great, and the delay will not be inconsiderable. I think it will be advisable to propose first a mutual production, and exchange of descriptions of the estate to be divided; and if the parties can agree on

Decrees for Partition and to settle Boundaries.

that point, a like production and exchange of valuation of the estates and proposals for the division to be made. Perhaps in this way the disputable points may be brought to a narrow compass, which must tend to make a fair division more easy than it can be if every part of the case is to be disputed and made the subject of evidence.

[From a MS. of Mr. Newland.]

(2) In the form of a commission of partition, 2 Harr. 20. edition 1767. referred to by Lord Redesdale, the partition is not directed to be by metes and bounds. But see Commission in *Curzon v. Lyster*, *supra*. And see Decree for Ascertaining Boundaries, No. VI. *post*. Decree for Dower. Decrees respecting Femê Covert, VI. *post*.

(3) Certificate of Return.

Upon the certificate of the commissioners' return, an order nisi will be made for confirming it. See *Attorney-General v. Hamilton*, 1 Mad. 215.

Exceptions may then be taken to it. See *Watson v. Duke of Northumberland*, 11 Ves. 153. *Turner v. Morgan*, 11 Ves. 157. note. S. C. 17 Ves. 546. note. *Jones v. Totty*, 1 Sim. 136. *Dean of Hereford v. Hullet*, 6 Price, 332.

Or a motion may be made to suppress the return. See *Watson v. Duke of Northumberland*, 11 Ves. 154. *Jones v. Totty*, *supra*.

In the Exchequer it is not necessary to confirm the certificate, but objections may be taken to it on further directions. *Dean of Hereford v. Hullet*, *supra*.

Where different returns are made by different commissioners, both will be suppressed. See *Watson v. Duke of Northumberland*, 11 Ves. 153. *Corbet v. Davenant*, 2 Bro. 252.

So in the Exchequer. *Watson v. Duke of Northumberland*, 11 Ves. 163.

(4) A schedule annexed to the commission having been written on paper, leave was given to engross it on parchment, and file it with the writ and return. *Jones v. Totty*, 2 S. & S. 219.

(5) Notwithstanding the direction in the commission, it is the practice to make the return without the depositions. *Watson v. Duke of Northumberland*, 11 Ves. 161.

No. V.

DECREE FOR A PARTITION OF AN ADVOWSON.

His Lordship doth declare that he is of opinion that the plaintiff is entitled to have a partition of the advowson of the vicarage of the parish church of Westerham, in the county of Kent, into moieties, to present by alternate turns (1), and doth think fit, and so order and decree, that a partition be accordingly made thereof into moieties, between the plaintiff and the defendant Elizabeth Steer, devisee in the will of the said John Steer. And for the making such partition the plaintiff and the defendant Elizabeth Steer are mutually to execute conveyances to each other, so that the plaintiff may hold one moiety of the said advowson to him and his heirs, and that the said defendant Elizabeth Steer may hold the other moiety thereof to her and her heirs, as tenants in common in severalty respectively. And that in such conveyance, a clause be inserted that the plaintiff and his heirs, and the said defendant Elizabeth Steer and her heirs, shall present to the said vicarage by alternate turns, and if the parties differ about the same, Mr. J. B. one &c. is to settle the conveyances; and the charges of the conveyances are to be borne equally between the plaintiff and the said defendant Elizabeth Steer. And it appearing in the cause that John Steer, under whom the defendant Elizabeth Steer claims, hath since the agreement for a partition or division of the premises, presented upon the last avoidance of the said vicarage, it is ordered and decreed that the plaintiff do present on the next avoidance, being the first turn from this time. And it is further ordered that the plaintiff's bill as against the defendant, the heir at law of the said John Steer, be dismissed out of this court with costs according to the course of the Court. But his Lordship doth not think fit to give any costs as between the plaintiff and the said defendant Elizabeth Steer. *Bodycote v. Steer*, L. C. 18th July, 1737. Reg. Lib. A. 1736. fol. 613. S. C. 1 Dick. 69.

For like decree. See *Equity Draftsman*, 655.

NOTE.

(1) See *Matthews v. Bishop of Bath and Wells*, 2 Dick. 652.

No. VI.

**DECREE FOR COMMISSION TO ASCERTAIN
BOUNDARIES BETWEEN FREEHOLD AND
COPYHOLD LANDS.**

His Honour doth order and decree, that a commission do issue, directed to certain commissioners to be therein named, to distinguish the several customary lands within the manor of Cokeham, in the county of Sussex, in the possession of the defendant George Newland, and formerly called Tobeas, to which Thomas Walker in the bill named was admitted in the year 1692, from the freehold lands of the said defendant, and the several other customary lands within the said manor of Cokeham, which are also in the defendant's possession. And it is ordered, that the said commissioners do set out, distinguish, and ascertain the said several customary lands by proper metes and bounds (1). And for that purpose both sides are to produce before the said commissioners all deeds, papers, and writings (2) in their custody or power relating thereto, and are to be examined upon interrogatories, as the said commissioners shall think fit; who are also to be at liberty to examine witnesses upon oath touching the matters in question, and to return the depositions of the said witnesses with the commission. And his Honour doth reserve the consideration of all further directions (3), and of the costs (4) of this suit, until after the return of the said commission. And any of the parties are to be at liberty to apply as &c. [See Usual Directions, No. XIX. *ante.*] *Winton v. Newland*, M. R. 6th August, 1813. Reg. Lib. B. 1812. fol. 1510.

For order for commission to divide freehold from copyhold lands. See *Equity Draftsman*, 616.

For a decree for a commission to ascertain charity lands. See *Attorney-General v. Peach*, L. C. 25th July, 1754. Reg. Lib. A. 1753. fol. 541.

For a decree for an issue to ascertain boundaries. See *Lethieullier v. Lord Castlemain*, 1 Dick. 46.

NOTES.

(1) The division is to be by metes and bounds. *Winton v. Newland, supra.* So in *Norris v. Le Neve*, L. C. 17th July, 1742. Reg. Lib. B. 1741. fol. 473. S. C. 3 Atk. 32.

(2) Sometimes directions are given for the production of documents for the purpose of previous inspection by the parties. *Norris v. Le Neve*, Appendix (1).

Possession.

Possession will be ordered to be delivered. *Lord Abergavenny v. Thomas*, Appendix (2). So in *Norris v. Le Neve*, L. C. 17th July, 1742. Reg. Lib. B. 1741. fol. 473. S. C. 3 Atk. 32.

Rents and Profits.

An account will be decreed of rents and profits. *Lord Abergavenny v. Thomas*, Appendix (2).

(3) Further directions are reserved till after the return of the commission. *Winter v. Newland, supra.* So in *Norris v. Le Neve*, L. C. 17th July, 1742. Reg. Lib. B. 1741. fol. 473. S. C. 3 Atk. 32.

(4) For costs of bills to ascertain boundaries. See *Beames on Costs*, 57.

APPENDIX (1).

Direction for Production of Documents.

And it is further ordered, that all deeds, writings, surrenders, copies of court rolls, books, and papers relating to any the premises in question, so to be distinguished and set out the one from the other, in the custody or power of any of the parties, be produced upon oath before the commissioners, and the same are to be deposited in the hands of the respective solicitors of the said parties in the country a fortnight before the execution of the said commission, and to be ascertained by the affidavits of the several parties depositing the same to be made before a Master extraordinary in the country, and the parties or their agents are to be at liberty to inspect the same in such solicitor's hands, and at their own expense to take copies thereof, or any parts thereof, as they shall see fitting. *Norris v. Le Neve*, L. C. 17th July, 1742. Reg. Lib. B. 1741. fol. 473. S. C. 3 Atk. 32.

APPENDIX (2).

Direction for Delivery of Possession, and Account of Rents and Profits.

And after the lands shall be so set out respectively, the said defendant is to deliver possession thereof to the said plaintiff, and the said plaintiff and his heirs are to hold and enjoy the same against the said defendant and his heirs, or any person or persons claiming under him, as parcel of his manor of Ewas Lacy. And it is further ordered and decreed, that the said defendant do come to an account before Mr. H. one &c. for the rents and profits of the lands comprised in such copies, or any of them, that have accrued since the death of the last life in such copies respectively, received by him, or by any other person &c. Lord Abergavenny v. Thomas, L. C. 21st May, 1739. Reg. Lib. B. 1738. fol. 294. S. C. 1 West, 649. And see Minutes of like Decree (entitled Decree for Partition), 2 Newl. Pract. 331.

No. VII.

DIRECTION FOR COMPENSATION.

And if by reason of confusion of boundaries or alteration of names, or any other circumstances the said commissioners shall not be able to distinguish or ascertain the particular copyhold or customary lands, or any of them, in that case they are to set out an equal quantity of the lands now in the possession of the said defendant, or as near as may be of equal value, with the land comprised in such copies, or so much thereof as cannot be distinguished or ascertained as aforesaid, to be held and enjoyed by the said plaintiff and his heirs, in lieu of such copyhold or customary lands. Lord Abergavenny v. Thomas, L. C. 21st May, 1739. Reg. Lib. B. 1738. fol. 294. S. C. 1 West, 649. And see minutes of like decree (entitled Decree for Partition), 2 Newl. Pract. 331.

NOTE.

That where the confusion of boundaries has arisen from the default of the tenant or copyholder, compensation will be decreed. See *Lord Abergavenny v. Thomas, supra*. *Speer v. Cawter*, 2 Mer. 418. *Attorney-General v. Fullerton*, 2 V. & B. 263. And see *Decrees in Duke of Leeds v. Earl of Strafford*, 4 Ves. 186. *Willis v. Parkinson*, 2 Mer. 510.

DECREES RESPECTING TITHES.

No. I.

DECREE FOR TITHES.

This Court doth think fit, and so order and decree, that it be referred to Mr. B. one &c. to take an account of what is due to the plaintiff from the defendants respectively, for all the tithes demanded by the plaintiff's bill, which have arisen, (1) accrued, and renewed, on the lands and premises in the occupation of the defendants respectively, within the said parish of Blunsden, in the county of Wilts, and the titheable places thereof. For the better taking of which accounts &c. [See Usual Directions, No. II. *ante*.] And it is further ordered that the defendants do pay unto the plaintiff what shall be found due to him from them respectively, together with the said plaintiff's costs (2) of this suit, to be taxed by the said Master. Bell v. Read, M. R. 28th April, 1746. Reg. Lib. A. 1745. fol. 574. S. C. 3 Atk. 590.

For Decrees for Tithes. See Equity Draftsman, 661.

NOTES.

(1) Although the decree is in terms retrospective only, in Chancery the account is carried on to the date of the report. Bell v. Read, *supra*. Daws v. Benn, Jac. 97. Archbishop of York v. Stapleton, 2 Atk. 137. S. C. Gwill. 772. 2 Eagle and Younge; 83. Carleton v. Brightwell, 2 P. W. 463. S. C. Gwill. 676. 2 Eagle and Younge, 7.

And see Decrees for account, No. I. Note (1). *ante*.

In Bell v. Read, *supra*, it is said that in the Exchequer, the ac-

count is confined to the time of the filing of the bill. And see *Archbishop of York v. Stapleton*, *supra*. *Carleton v. Brightwell*, *supra*. But in *Hardwicke v. Newre*, 1 Eagle and Younge, 413. future payments were decreed. So in *Kirkby v. Redhead*, 1 Eagle and Younge, 414. And see *Chamberlaine v. Newte*, 1 Bro. P. C. 157. S. C. 1 Eq. Abr. 366. pl. 3.

And by an order of the Court of Exchequer of the 20th February, 1750, 2 Fowl. 279. accounts in tithe suits are to be carried on as in other cases, to the time of the report.

(2) *Costs.*

Where an account of tithes is directed, costs are given by the decree in the first instance, and not reserved till after the report. *Bell v. Read*, *supra*. *Duke of Rutland v. Lowe*, Appendix (1).

Otherwise in decrees for a mutual account. See *Decrees for Account*, No. I. Note (6), *ante*.

For costs on bills for tithes. See *Beames on Costs*, 65. *Toller on Tithes*, 283.

Where costs are decreed to be paid by the defendants generally, each is liable for the whole. See *Ex parte Bishop*, 8 Ves. 333.

In *Jones v. Cawhorne*, 2 Fowl. 356. an order was made after decree, for apportioning the costs. But in *Michel v. Bullen* 6 Price, 87. such an order was refused.

To obviate this inconvenience, costs should be apportioned by the decree. *Wolley v. Brownhill*, 13 Price, 511.

For order for recording tender of tithes, and costs. See 2 Fowl. 374.

Further Directions.

Where an account of tithes is directed with costs, it seems that further directions should not be reserved. *Bell v. Read*, *supra*. *Duke of Rutland v. Lowe*, Appendix (1).

But this is sometimes done. See *Decrees for Tithes*, *Equity Draftsman*, 661.

In the Exchequer, though costs are given, further directions are reserved. *Griffith v. Lewis*, 4 Bro. P. C. 314. S. C. 2 Eagle and Younge, 52. *Trott v. Hagger*, Appendix (2), and cases there referred to.

Decrees respecting Tithes.

APPENDIX (1).

Decree for Tithes.

His Honour doth order and decree that it be referred to Mr. M. one &c. to take an account of what is due from the defendants, or either of them, to the plaintiff, for and in respect of all tithes and titheable matters arising, growing, and renewing, upon the several lands within the hamlet of Holmsfield, in the county of Derby, in the pleadings mentioned, and the titheable places thereof, in the occupation of the several defendants or either of them, since the 25th day of March, 1809. For the better taking whereof &c. And it is ordered that what upon taking of the said account shall appear to be due from the said several defendants, or either of them, be paid by them unto the plaintiff. And it is ordered that the said Master do tax the plaintiff's their costs of this suit (in case the parties differ about the same) which are to be paid by the said defendants. And any of the parties are to be at liberty to apply to this court as &c. *Duke of Rutland v. Lowe*, M. R. 8th November, 1814. Reg. Lib. A. 1814. fol. 688.

APPENDIX (2).

Decree for Tithes in Exchequer.

It is this day ordered, adjudged, and decreed by the Court, that it be, and it is hereby referred to &c. to take an account of all and every the titheable matters and things demanded by the said bill. In the taking of which said account the said &c. is to make &c. [See Usual Directions, No. III, *ante*.] And any of the parties are to be at liberty to apply in the mean time to the Court as there shall be occasion. And it is further ordered and decreed by the Court that the said defendant do pay to the plaintiff the costs of this suit to be taxed by the said &c. to whom it is hereby referred to tax the same. And this cause is to be continued in the paper of causes to be further heard upon the coming in of the said report, when this court shall make such further order herein as shall be just. *Trott v. Hagger*, 17 December, 1788. Decrees in Exchequer, Mich. 29th Geo. 3. No. I.

So in *Davis v. Duppa*, 8th November, 1787. Decrees in Exchequer, Mich. 28th Geo. 3. No. II.

Chapman v. Laasdown, 7th July, 1720. Decrees in Exchequer, Trin. 30th Geo. 3. No. III.

No. II.

DECREE FOR ESTABLISHING MODUS (1).

His Lordship, by consent of the clerk in court for the plaintiff in the original cause, doth order that the said original bill do stand dismissed out of this Court without costs. And by the like consent of the clerk in court for the defendant in the cross cause, it is ordered and decreed that the said modus of 7*l.* a year sought to be established by the said cross bill, be established. And that the arrears thereof now due, be paid by the plaintiffs in the said cross cause, to the said defendant Richards, the rector of the said parish of Llanfyllin. And that the growing payments thereof be continued and paid yearly to the said rector and his successors, from time to time, upon Candlemas day. And no costs are to be paid on either side in the said cross cause. (2) Richards v. Evans, and Price v. Richards, L. C. 27th November, 1747. Reg. Lib. B. 1747. fol. 151. S. C. 1 Ves. 39. Belt's Supplement, 34.

For decree for issue on modus. See Decrees for Issue, &c. No. I. *post.*

NOTES.

(1) Formerly, on a bill for tithes in kind, the plaintiff might have a decree for payment of a modus, though the modus was insisted to be bad by the bill. Ekins v. Dormer, Appendix (1). Cart v. Ball, 1 Ves. 3. Belt's Supplement, 4.

But whether this is now the practice, Q.

(2) As to costs of bills for establishing moduses. See Beames on Costs, 72.

APPENDIX (1).

Direction for Payment of Moduses.

And the plaintiff in the said original cause declining to proceed to a trial at law, in respect of the two annual payments of 10*s.* a year for the tithes of hay of the said manor, and 5*l.* a year for the privy tithes of the demesne lands of the said manor, it is ordered

that the said Master do take an account of what is due to the said plaintiff for the said two annual payments of 10s. and 5l. a year from the respective times of the last payments thereof. And what shall be found due upon the said account, is to be paid by the defendant Dormer to the said plaintiff Ekins. *Ekins v. Dormer, et contra*, L. C. 20th July, 1747. Reg. Lib. A. 1746. fol. 690. S. C. 3 Atk. 534.

DECREES FOR SPECIFIC PERFORMANCE.

No. I.

DECREE FOR REFERENCE OF TITLE.

This Court doth order (1), that it be referred (2) to Mr. W. one &c. to inquire whether a good title can (3) be made to the estates comprised in the agreement in the pleadings mentioned. And it is ordered, that he do state his opinion thereon to the Court. And in case he shall be of opinion that a good title can be made, it is ordered, that he do inquire and state when it was first shewn that a good title could be made (4). And for the better discovery of the matters aforesaid &c. [See Usual Directions, No. I. *ante.*] And this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report. And either of the parties are to be at liberty to apply &c. [See Usual Directions, No, XIX. *ante.*] *Harding v. Beckford*, V.C. 11th Nov. 1824. Reg. Lib. A. 1824. fol. 696.

For order for reference of title. See Hand's Pract. 69.

NOTES.

(1) *Declaration of Right to specific Performance.*

According to the old practice there were two ways of framing a decree in a suit for specific performance. The one was to declare that the plaintiff was entitled to a specific performance, if a good title could be shown, and then to direct a reference as to the title; the other to refer the title to the Master, and to follow up that direction by a declaration, that if a good title was shown, the agreement ought to be specifically performed. *Stevens v Guppy*, 3 Russ. 182.

Decrees for specific Performance.

And the omission of this declaration is often attended with inconvenience. S.C. And see *Mole v. Smith*, Jac. 495.

Where the question of title is not the only issue, but the defendant resists specific performance on any other ground, it is specially necessary that it should be inserted. *Pitt v. Davis*, 3 Russ. 182. note.

Of late, however, it is seldom inserted. *Harding v. Beckford*, *supra*. *Burroughs v. Oakley*, 3 Swan. 172. *Le Grand v. Whitehead*, 1 Russ. 309. note. But see *Burton v. Todd*, 1 Swan. 258.

Nevertheless, where a reference of title is directed, it will, it seems, be implied. See *Mole v. Smith*, Jac. 494. *Le Grand v. Whitehead*, 1 Russ. 309.

Where a reference of title is directed, the declaration as to the right to specific performance is usually made on further directions. See further Directions, No. II. Note (1), *post*.

Where specific performance is decreed without a reference of title, it will be made upon the original hearing. *Margravine of Anspach v. Noel*, 1 Mad. 317. *Dakin v. Cope*, 2 Russ. 175.

(2) Reference of Title.

In *Rose v. Calland*, 5 Ves. 186. a bill by a vendor for the specific performance of a contract for the purchase of an estate was dismissed, upon an objection to the title, without a reference. And in *Omerod v. Hardman*, 5 Ves. 722. a like decree of the Vice-Chancellor of the duchy court of Lancaster was affirmed on appeal. But see what is said of these cases by the Lord Chancellor, in *Jenkins v. Hiles*, 6 Ves. 654. And it seems that, generally, either the vendor or the purchaser may insist upon a reference of the title in the first instance; the vendor being entitled to the opportunity of perfecting it, and the purchaser of fully investigating it before the Master. S.C. 646. But either party may preclude himself from this right by his mode of pleading. See S.C. 653, 654. So, where the acts of the purchaser amounted to a waiver of his right, specific performance was decreed in the first instance. *Fleetwood v. Green*, 15 Ves. 594. *Margravine of Anspach v. Noel*, 1 Mad. 310. And see *Fludyer v. Cocker*, 12 Ves. 25. *Balfour v. Welland*, 16 Ves. 151. Taking possession and acts of ownership were held not to be a waiver under the circumstances. *Burroughs v. Oakley*, 3 Swan. 159.

(3) The direction is to inquire whether the vendor can, not whether

he could make a title at the time of entering into the contract. *Langford v. Pitt*, 2 P. W. 630.

Accordingly, where a title can be made before the hearing it is sufficient. *Wynn v. Morgan*, 7 Ves. 202.

Or before the report. *Langford v. Pitt*, *supra*. *Jenkins v. Hiles*, 6 Ves. 655. *Seton v. Slade*, 7 Ves. 279. *Mortlock v. Buller*, 10 Ves. 315.

Or upon the hearing for further directions. *Paton v. Rogers*, 6 Mad. 256.

And a purchaser under a decree will not be discharged upon the Master's report against the title, if it can be completed within a reasonable time. *Coffin v. Cooper*, 14 Ves. 205.

But the rule is attended with hardship. *Lechmere v. Brasier*, 2 J. & W. 289.

And where the vendor has not been able to make a title before the decree, it is material as to costs. *Seton v. Slade*, *supra*.

With this view an inquiry will be directed as to the time at which a good title could be made. See Note (4), *post*.

The vendor is not entitled to costs, except from the time the title is completed. *Anon.* cited 1 Mad. 536.

And up to that time he must pay the costs. *Harford v. Spurrier*, 1 Mad. 538.

(4) *Reference at what Time, &c.*

Formerly the Court directed a reference of the title only in the first instance, and upon further directions directed a reference back to inquire at what time a good title could be made, with a view to costs. *Gibson v. Clarke*, 2 V. & B. 103. But the reference will now be extended to both objects in the first instance. *Harding v. Beckford*, *supra*. *Wright v. Bond*, 11 Ves. 39. *Jennings v. Hopton*, 1 Mad. 211. *Anon.* 3 Mad. 495. If a reference for the latter purpose is not obtained in the first instance, the defendant is not precluded from obtaining it after the report. *Gibson v. Clarke*, *supra*. *Daly v. Osborne*, 1 Mer. 382. *Birch v. Haynes*, 2 Mer. 444. In *Jennings v. Hopton*, *supra*, after a reference for the former purpose only, a motion before the report, to extend it to the latter object, was granted. But in *Hyde v. Wroughton*, 3 Mad. 279. a like motion was refused. So in the Exchequer. *Lubin v. Lightbody*, 8 Price, 606. That a decretal order for both purposes may be obtained on motion. See *Anon.* 3 Mad. 495.

No. II.

**DECREE FOR SPECIFIC PERFORMANCE.
FURTHER DIRECTIONS.**

This Court doth order and decree, that the agreement in the pleadings mentioned, dated the 23d day of September, 1812, be specifically performed (1) and carried into execution. And it is ordered, that it be referred to the said Master to compute interest (2), at the rate of 4*l.* per cent. per ann. on the sum of £——, the residue of the purchase money for the estate and premises comprised in the said agreement, from the 30th day of November 1812, the time when the same ought to have been paid, according to the terms of the said agreement. And the said Master is to take an account of the rents (3) of the said estate and premises received by or come to the hands of the plaintiff, or to the hands of any person or persons by his order or for his use. And it is ordered, that what shall be coming on the said account of rent (after deducting therefrom the sum of £——, the moiety of the excise duty, which by the said conditions is to be paid by the defendant) be deducted from the sum of £——, and what shall be found due for interest thereon as aforesaid. And upon the plaintiff executing and delivering (4) to the defendant, at the expense of the defendant, according to the said agreement and conditions of sale, a proper conveyance of the said estate and premises contained in the said agreement, such conveyances to be settled by the said Master if the parties differ about the same, it is ordered, that the defendant do pay unto the plaintiff what shall remain due on the balance of the said account. And the Court doth not think fit to give any costs (5) on either side. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Fane v. Spencer*, V. C. 15th July 1815. Reg. Lib. A. 1814. fol. 1521.

For like decree on original hearing, defendant having waived his right to reference of title. See *Margravine of Anspach v. Noel*, V. C. 7th March, 1816. Reg. Lib. B. 1815. fol. 531. S. C. 1 Mad. 317.

NOTES.

(1) Of late, where a reference of title is directed on the original hearing, a declaration as to the right to specific performance is seldom made until the hearing for further directions. *Fane v. Spencer, supra.* *Bridges v. Robinson*, 3 Mer. 694. *Hand's Pract.* 128. And see *Reference of Title*, No. I. Note (1), *ante*.

(2) *Interest.*

Where there is no stipulation as to interest, the general rule of the Court is, that the purchaser, when he completes his contract after the time stipulated, shall be considered as in possession from that time, and shall from that time pay interest at 4*l.* per cent., taking the rents and profits. *Esdaile v. Stephenson*, 1 S. & S. 123. And see *Ackland v. Gaisford*, 2 Mad. 32. *Margravine of Anspach v. Noel*, 1 Mad. 317. *Paine v. Meller*, 6 Ves. 352. *M'Namara v. Williams*, *Ib.* 143. *Davy v. Barber*, 2 Atk. 490

If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the Court therefore gives the vendor no interest, but leaves him in possession of the interim rents and profits. *Esdaile v. Stephenson, supra.* *Jones v. Mudge*, L. C. 7th November, 1827. *Ex relatione Mr. Tinney.*

Where by the terms of the contract it was stipulated, that if the purchase was not completed by a given day, the purchaser should pay interest at 5*l.* per cent. until the completion, it was held, that the purchaser must pay interest, notwithstanding delay on the part of the vendor, the terms of the stipulation applying to every delay, however occasioned. *Esdaile v. Stephenson, supra.*

Where by the terms of the contract it was agreed, that if by reason of any unavoidable obstacle the contract could not be completed on a given day, the purchaser should pay interest at 5*l.* per cent. from that time until the completion, and the vendor did not show a title until five years after the original hearing, no unavoidable obstacle being shewn, the Court refused interest. *Birch v. Podmore*, V. C. 17th January, 1828. *Ex relatione Mr. Tinney*

(3) *Rents and Profits.*

See *Interest*, Note (2), *supra*.

Decrees for specific Performance.

Ordinarily the vendor will only be directed to account for the rents and profits received by him, or by his order, or for his use. *Fane v. Spencer, supra.* And see *M'Namara v. Williams*, 6 Ves. 143.

But he may also be directed to account for what, without his wilful default, he might have received. *Ackland v. Gaisford*, 2 Mad. 28. *Wilson v. Clapham*, 1 J. & W. 36.

See Decrees for Account, No. I. Note (6), *ante*.

Rests.

Where payments have been made on account of the purchase money to an amount exceeding the interest, rests may be made, though not directed by the decree. *Griffith v. Heaton*, 1 S. & S. 271. But see *Webber v. Hunt*, 1 Mad. 14. *Donovan v. Fricker*, 8 Jac. 165.

(4) The payment of the purchase money and the execution of the conveyance are simultaneous acts, and should be done interchangeably. *Margravine of Anspach v. Noel*, 1 Mad. 316. And see *Urmston v. Singleton*, Usual Directions, No. VIII. Appendix (1) *ante*.

Delivery of Deeds.

There should be a direction for the delivery up of deeds &c. *Margravine of Anspach v. Noel*, 1 Mad. 317. *M'Namara v. Williams*, 6 Ves. 144.

Costs.

(5) For costs of bills for specific performance. See Beames on Costs, 58. And see Decrees for Dismission, No. II. note, *post*.

No. III.

DECREE FOR SPECIFIC PERFORMANCE WITH AN ABATEMENT.

His Honour doth declare that the plaintiff is entitled to a specific performance of the agreement in the pleadings mentioned, and to an abatement from the residue of the purchase money and interest, but to the amount only of what would be the worth of the deficiency of the soil mentioned in the pleadings covered with wood, after deducting the value of the wood thereon, and doth order and decree the same accordingly. And that it be referred to Mr. T. one &c. to settle

such abatement, and to compute interest on the residue of such purchase money after the rate of £5 per cent. per annum, in case the parties differ about the same. And upon the plaintiff paying unto the defendants what the said Master shall find to be due from him on account of the purchase money under the said agreement stipulated to be paid, after such abatement as aforesaid, it is ordered that the defendants do convey and assign the premises so contracted to be sold, to the plaintiff, or as he shall direct; such conveyance to be settled by the said Master in case the parties differ about the same. And his Honour doth not think fit to give costs on either side. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Hill v. Buckley*, M. R. 24th January, 1811. Reg. Lib. A. 1810. fol. 1333. S. C. 17 Ves. 394.

No. IV.

DECREE FOR SPECIFIC PERFORMANCE OF AGREEMENT FOR LEASE.

His Lordship declared, that the said agreement, dated the 14th day of August, 1741, ought to be carried into execution, according to the true intent and meaning of the parties, and doth order and decree the same accordingly. And that a lease be executed by the defendants Statham and his wife to the plaintiff of the premises in question, with the appurtenances, for the life of the said Mary the defendant's wife, at the yearly rent of 9*l.* free from taxes; and that such clauses and agreements be inserted in the said lease as are directed by the memorandum of the said agreement. And if the parties differ, it is hereby referred to Mr. B. one &c. to settle the same. And it is ordered, that the said plaintiff do execute a counterpart of such lease to the said defendants, and that such lease and counterpart be at the equal expense of the said plaintiff and defendants; but the said defendants are to be at the expense of a licence from the lord of the manor for making the same. And it is ordered, that the plaintiff do pay

the said defendants their costs of this suit, to be taxed by the said Master. *Joynes v. Statham*, L. C. 29th October, 1747. Reg. Lib. A. 1746. fol. 87.

No. V.

DECREE FOR SPECIFIC PERFORMANCE OF MARRIAGE ARTICLES.

[The defendant John Cowley was the executor of the covenantor. The defendant Christopher Cowley was a trustee in the articles for the plaintiffs. The defendant John Cowley admitted assets.]

His Lordship doth think fit and so order and decree, that the said articles be specially performed and carried into execution. And that the defendant John Cowley do with the approbation of Mr. S. one &c. purchase lands of inheritance of the clear yearly value of £—— a year, according to the true intent and meaning of the said articles. And that the same when purchased be settled to the uses and upon the trusts and to the intents and purposes declared and mentioned in the said marriage articles, with the approbation of the said Master. And either party is to be at liberty to propose a proper purchase before the said Master. And till such purchase shall be made, it is ordered that the said defendant do continue the payment of £—— a year for the time to come to the plaintiff. And it is ordered, that the plaintiff do pay the defendant Christopher Cowley his costs of this suit, to be taxed by the said Master; which are to be added to the plaintiff's own costs, and to be refunded to him by the said defendant John Cowley out of the said testator's estate. And the said defendant is thereout also to pay the said plaintiff's own costs of this suit to be taxed by the said Master. And as between the plaintiff and the said defendant, his Lordship doth reserve the consideration of the subsequent costs, and of all further directions until after &c. [See Usual Directions, No. XV. and XVII. *ante.*] And the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Jackson v. Cowley*, L. C. 25th November, 1747. Reg. Lib. A. 1747. fol. 151.

DECREES FOR SETTING ASIDE DEEDS.

No. I.

DECREE SETTING ASIDE ANNUITY FOR DEFECT OF THE MEMORIAL.

His Lordship doth order and decree, that it be referred to Mr. S. one &c. to take an account of what is due to the defendant for principal and interest in respect of the sum of £——, paid for the purchase (1) of the annuity in question, and tax the defendant his costs (2) of this suit. And the said Master is also to take an account of all sums of money (3) received by the defendant, or by any other person or persons by his order or for his use, on account of the said annuity. And it is ordered, that what shall be found due from the said defendant on the said account be deducted out of what shall be found due to the defendant for principal, interest, and costs as aforesaid. And upon the plaintiff's paying to the defendant what, if any thing, shall remain due to the defendant for principal, interest, and costs as aforesaid, within three months after the Master shall have made his report, at such time and place as the Master shall appoint, or in case it shall be found the defendant hath been fully satisfied, it is ordered that the defendant do deliver (4) to the plaintiffs the indenture, dated the 9th day of July, 1784, and the bond dated the same day, to be cancelled; and that the defendant do also reconvey the premises free and clear of and from all incumbrances done by him, or any claiming by, from, or under him, out of which the said annuity was payable to the plaintiff, or to whom he shall appoint; and also deliver all deeds and writings in his custody or power relating to the said

premises to the plaintiff, or to such person as he shall direct. And in case it shall appear that the defendant hath been over paid, it is ordered, that he do pay such overplus (5) to the plaintiffs. And in case the plaintiffs shall not so pay to the defendant what, if any thing, shall be found due to him for principal, interest, and costs as aforesaid, after such deductions as aforesaid, by the time aforesaid, the plaintiff's bill is to stand dismissed out of this Court with costs, to be taxed by the Master. And for the better taking the account &c. (6). [See Usual Directions, No. II. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Byne v. Vivian*, L. C. 28th January, 1800. Reg. Lib. A. 1799. fol. 337. S. C. 5 Ves. 604.

NOTES.

(1) *Account of Consideration.*

It was formerly doubted at law whether, where an annuity was set aside for a defect in the memorial, the consideration could be recovered back. See *Davis v. D. of Marlborough*, 2 Swan. 157. *Low v. Barchard*, 8 Ves. 136. *Bromley v. Holland*, 7 Ves. 23.

But it is now settled that it may. See *Davis v. D. of Marlborough*, *supra*. *Jones v. Harris*, 9 Ves. 492. *Low v. Barchard*, *supra*. *Bromley v. Holland*, *supra*.

In *Davis v. D. of Marlborough*, *supra*, it is said by the Lord Chancellor, that on a bill by the grantor to have an annuity deed delivered up as void under the statute, he is entitled to that relief, without accounting for the consideration paid for the annuity, leaving the annuitant to proceed at law. But see *Aguilar v. Aguilar*, 5 Mad. 416. and note.

Lien for Consideration.

The grantee has no lien for the consideration upon the fund upon which the annuity is secured. *Jones v. Harris*, 2 Ves. 496. *A fortiori*, where the fund is the separate estate of a *fême covert*. *Williams v. D. of Bolton*, 2 Ves. jun. 138. S. C. 4 Bro. 297. *Jones v. Harris*, 9 Ves. 486. *Angel v. Hadden*, 2 Mer. 169. *Aguilar v. Aguilar*, 5 Mad. 414.

But the grantor may deprive himself of the benefit of the rule by an offer to redeem. See *Davis v. D. of Marlborough*, 2 Swan. 156.

Barzelgetti v. Battine, *Ib.* *Byne v. Vivian*, *supra.* See 5 Mad. 417. note. So it seems in a case of misconduct. *Ex parte Wright*, 19 Ves. 255.

It seems however that the offer may be made so as to constitute a personal charge only, not a charge on the fund. See *Davis v. D. of Marlborough*, 2 Swan. 160. *D. of Bolton v. Williams*, 2 Ves. jun. 142.

(2) *Costs.*

In *Byne v. Potter*, 5 Ves. 609. the defendant was decreed to pay the costs. But see what is said of this case in *Bromley v. Holland*, 7 Ves. 28.

In *Bromley v. Holland*, 7 Ves. 3. S. C. Coop. 9. the decree was without costs. So in *Duff v. Atkinson*, 8 Ves. 577. *Dupuis v. Edwards*, 18 Ves. 362.

But it seems that the defendant will be allowed his costs. See *Byne v. Vivian*, *supra.* *Hoffman v. Cooke*, 5 Ves. 633. *Holbrook v. Sharpey*, 19 Ves. 134.

As to costs in the case of oppressive bargains. See *Beames on Costs*, 105.

(3) *Account of Payments.*

Where the consideration is recovered at law, the payments made in respect of the annuity are deducted. See *Davis v. D. of Marlborough*, 2 Swan. 157. *Bromley v. Holland*, 7 Ves. 23.

And the rule is the same in equity. See *Bromley v. Holland*, *supra.* *Byne v. Vivian*, 5 Ves. 608. *Hoffman v. Cooke*, 5 Ves. 633.

In *Bromley v. Holland*, 5 Ves. 610. the account was confined to the time of the filing of the bill. But this was reversed on appeal, and an account directed from the beginning. S. C. 7 Ves. 3. Coop. 9. And see *Holbrooke v. Sharpey*, 19 Ves. 133.

Rests.

In taking the account rests will be directed. See *Hoffman v. Cooke*, 5 Ves. 633. *Bromley v. Holland*, 7 Ves. 29. S. C. Coop. 26. and what is said *arguendo* in *Holbrook v. Sharpey*, 19 Ves. 132.

See *Decrees for Account*, No. I. Note (6), *ante.*

(4) *Delivery of Deeds.*

That equity has jurisdiction to decree deeds void under the Annuity Act to be delivered up. See *Byne v. Vivian*, *supra.* *Byne v.*

Potter, 5 Ves. 609. Bromley v. Holland, 5 Ves. 610. S. C. 7 Ves. 3. Coop. 9. Hoffman v. Cooke, 5 Ves. 623. Lowe v. Barchard, 8 Ves. 135. Duff v. Atkinson, 8 Ves. 577. Philipps v. Crawford, 9 Ves. 214. S. C. 13 Ves. 475. Jones v. Harris, 9 Ves. 493. Underhill v. Horwood, 10 Ves. 218. Ware v. Horwood, 14 Ves. 28. Dupuis v. Edwards, 18 Ves. 358. Holbrook v. Sharpey, 19 Ves. 131. Davis v. D. of Marlborough, 2 Swan. 157. Aguilar v. Aguilar, 5 Mad. 414.

And this after the failure of an application to a court of law for the like purpose. Bromley v. Holland, *supra*. Angel v. Hadden, 2 Mer. 164. And notwithstanding an order for the payment of the annuity in another cause, not expressly instituted for the purpose of determining the validity of the annuity. Angel v. Hadden, *supra*.

Whether the bill can be sustained without an offer to repay the consideration, Q. See Account of Consideration, Note (1), *ante*.

(5) *Surplus.*

In Byne v. Potter, 5 Ves. 609. no direction was given for repayment of the surplus. And see what is said by the Lord Chancellor in Bromley v. Holland, 7 Ves. 13. 24. But that the defendant will be decreed to repay the surplus. See Byne v. Vivian, *supra*. Holbrook v. Sharpey, 19 Ves. 131.

As to refunding in case of usury. See Bosanquet v. Earl of Westmoreland, 1 West, 598.

(6) *Allowances.*

In *ex parte* Shaw, 5 Ves. 620, the defendant was not allowed the expense of insurance, nor the costs incurred in supporting his annuity.

In Hoffman v. Cooke, 5 Ves. 623, the expense of insurance was allowed. And see Gwynne v. Heaton, 1 Bro. 11. Heathcote v. Paignon, 2 Bro. 170.

In the first case it was allowed on the ground of an offer contained in the bill, which was struck out by amendment, but afterwards restored in consequence of a motion for that purpose by the defendant. See Mr. Bell's Evidence, Chan. Rep. Appendix A. 392.

Whether the expense of insurance is allowed at law. Q. See *Ex parte* Shaw, 5 Ves. 622. Hoffman v. Cooke, 5 Ves. 632. Sawyer v. Bence, there cited.

It seems that formerly the Court, in setting aside oppressive instruments, often directed in the decree that every thing should be taken most strongly against the defendant. See *Mitford v. Featherstonhaugh*, 2 Ves. 445.

No. II.

DECREE SETTING ASIDE FORGED INSTRUMENT.

[The plaintiff Amey was devisee of the copyhold, which had been purchased by her late husband, John Thomas, through the intervention of the defendant Braban, but to which he had not been admitted. The defendant Morgan, the lord, claimed the premises as forfeited. The defendant Williams, the heir at law, claimed them as not well devised. The defendant Braban had got into possession, and set up a title in himself, under a declaration of trust alleged to be executed by John Thomas, but which was forged. The defendant Anne Powell was heir at law of the vendor.]

It appearing to the Court that the said declaration of trust was forged, His Honour doth order that the plaintiff's bill, as against the defendant Anne Powell, do stand dismissed out of this court with forty shillings costs; and that it be referred to Mr. I. B. one &c. to tax the said defendants Morgan and Williams their costs of this suit, which are to be paid to them by the plaintiffs. And it is further ordered and decreed, that the said defendant Williams be admitted to the said copyhold estate, at the expense of the said plaintiffs, and do then surrender the same to the said plaintiff Amey, her heirs and assigns; and that thereupon the said plaintiff Amey be admitted to the said copyhold estate at the plaintiff's expense. And the said defendant Morgan is to permit such admittance and surrender to be made accordingly. And the said defendant Braban is to come to an account before the said Master for the rents and profits of the said estate received by him, or by any other person or persons for his use. For the better discovery whereof &c. [See Usual Directions, No. II. *ante*.] And what upon the balance of the said account shall appear to be remaining in the said defendant's hands of the said

Decrees for setting aside Deeds.

rents and profits, is to be by him paid to the said plaintiffs. And the said defendant Braban is to pay unto the said plaintiffs their costs of this suit, to be taxed by the said Master, together with the costs which the said plaintiffs shall pay to the said defendants, Morgan and Williams as aforesaid. *Masters v. Braban*, M. R. 10th July 1735. Reg. Lib. B. 1734. fol. 504. S. C. 1 Russ. 560. note.

NOTE.

Forged Instrument.

In the case of a forged instrument equity will give relief, though not discovery. See *Brownsword v. Edwards*, 2 Ves. 246.

The Court has jurisdiction to give relief without directing an issue. *Peake v. Highfield*, 1 Russ. 559. and cases there cited. *Fitton v. Earl of Macclesfield*, 1 Vern. 292. But, unless in a plain case, an issue will be directed. *Peake v. Highfield*, *supra*. *Barnsley v. Powel*, 1 Ves. 120. And see *Jones v. Jones*, 3 Atk. 111. *Shirley v. E. Ferrers*, 3 P. W. 77.

Where an issue was directed to try the validity of a will suspected to be forged, the Judge was directed to indorse upon the postea whether the finding of the jury proceeded upon the ground of forgery or defect in execution. *Barnsley v. Powel*, *supra*.

Further Directions.

In a case mentioned by Lord Hardwicke, 2 Ves. 246. a deed being found to be forged was cancelled, and cut to pieces in court. But in *Frankland v. Hampden*, 1 Vern. 66. it was said by the Solicitor-General, and not denied by the Court, that a forged deed or writing cannot be torn or defaced by law, but must be kept so that the king may proceed upon it against the criminal.

And with this view, instruments suspected to be forged will be ordered to be deposited with the registrar. *Bishop of Winchester v. Fournier*, 2 Ves. 445. and cases there cited. And see *Calvert v. Saunders*, 1 West, 698. Lord Redesdale, 104. note. In the case of *John Ward*, cited 2 Ves. 447., a prosecution was directed.

Where the verdict is against the forgery leave will be given to the

plaintiff to proceed on the ground of fraud. *Jones v. Jones*, 3 Atk. 110. and case before Lord Macclesfield, there cited.

It seems that the ancient form of the decree was, that the instrument should be damned. See *Bishop of Winchester v. Fournier*, 2 Ves. 448. *Fitton v. Earl of Macclesfield*, 1 Vern. 289. 292.

DECREES ON LOST DEEDS, &c.

No. I.

DECREE FOR FORECLOSURE WHERE DEEDS LOST.

His Honour doth order and decree that the defendant Lionel Robson do, on or before the 17th day of December next, pay into the bank with the privy &c. [See Usual Directions, No. X. *ante.*] the sum of £—— (being the amount of the principal sum of £—— stated in the plaintiff's bill to be due on the mortgages in the pleadings mentioned, with interest thereon from &c. after deducting property tax). And it is ordered that the same when so paid in, be laid out &c. [See Usual Directions, No. XII. *ante.*] And it is further ordered that it be referred to Mr. A. one &c. to take an account of what is due to the plaintiff for principal and interest upon her several mortgages in the pleadings mentioned. And it is ordered that the said master do inquire and state to the Court what has become of the several mortgage securities in the pleadings mentioned. And for the better taking the said account &c. [See Usual Directions, No. II. *ante.*] And his Honour doth reserve the consideration of all further directions, and of the costs of this suit, until after &c. [See Usual Directions, No. XV. and XVII. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Stokoe v. Robson*, M. R. 20th July, 1814. Reg. Lib. B. 1813. fol. 1502. S. C. 3 V. & B. 51.

NOTE.

Lost Instrument.

Where the plaintiff sues on a lost instrument, if the defendant in-

sists on it, a trial will be directed at law. *Askew v. Poulterers' Company*, 2 Ves. 90. *Clavering v. Clavering*, Ib. 233.

Otherwise in the case of a suppressed instrument. See No. III. Note, *post*.

That the evidence as to the loss of a deed, is the same in equity as at law. See S. Cs. And *Whitfield v. Fausset*, 1 Ves. 392. *Walmsley v. Child*, Ib. 344.

To let in secondary evidence of the contents of the instrument, there must be proof that the instrument once existed, and of the loss of it. See *Whitfield v. Fausset*, 1 Ves. 389.

So to let in secondary evidence of a lost note, there must be proof that the original note was genuine. *Goodier v. Lake*, 1 Atk. 446. S. C. 1 West, 193.

As to what evidence of loss is sufficient to let in secondary evidence. See *R. v. Inhabitants of Castleton*, 6 T. R. 236. *Kensington v. Inglis*, 8 E. R. 273. *Rex v. Inhabitants of Morton*, 4 M. & S. 48. *R. v. Inhabitants of Stoke Golding*, 1 B. & A. 173. *Brewster v. Sewell*, 3 B. & A. 296. *Freeman v. Arkell*, 2 B. & C. 494. *R. v. Inhabitants of Denio*, 7 B. & C. 620. *Cox v. Allingham*, Jac. 338.

As to what secondary evidence will be sufficient. See *Skipwith v. Stanley*, 11 Ves. 64. *Ward v. Garnons*, 17 Ves. 134. *Villiers v. Villiers*, 2 Atk. 71. *Fisher v. Samuda*, 1 Camp. 193. *Waller v. Horsfall*, Ib. 501.

On a bill of foreclosure, the mortgage deeds being lost, an inquiry will be directed as to the loss. *Stokoe v. Robson*, *supra*. *Shelmar-dine v. Harrop*, 6 Mad. 39.

So on a bill for redemption. *Smith v. Bicknell*, 3 V. & B. 51. note.

No. II.

FURTHER DIRECTIONS.

His Honour doth order that it be referred to the said Master, Mr. A. to tax the defendants their costs (1) of this suit. And it is ordered that the said defendant Lionel Robson, be at liberty to retain &c. in part payment of such costs. And it is ordered that so much of the £—— Bank 3 per cent. annuities standing in the name of the Accountant-General in trust in this cause, as with the dividends to accrue on the

said Bank annuities until the sale hereby directed, will be sufficient to raise so much of the said costs as shall remain after retaining &c. the amount thereof to be certified by the said Master, be sold with the privy &c. [See Usual Directions, No. XIV. *ante.*] And it is ordered, that out of the money to arise by the said sale, and any other sum &c. what the Master shall certify to remain of the said costs be paid to Mr. C. C. the defendant's solicitor. And for that purpose the said Accountant-General is to draw &c. [See Usual Directions, No. XI. *ante.*] And it is ordered that the plaintiff do at her own expense execute to the defendant Lionel Robson her bond to indemnify (2) the said defendant against any demand which may be made upon him in respect of the mortgage deeds in the pleadings mentioned; such bond to be settled by the said Master in case the parties differ about the same. And it is ordered that upon the due execution of such bond, (such execution to be certified by the said Master), the residue of the said Bank annuities be transferred to the said plaintiff. And thereupon it is ordered that the plaintiff do re-convey and re-assign the said mortgaged premises unto the said defendant Lionel Robson, or as he shall direct, free and clear of all incumbrances done by her, or any claiming by, from, or under her; such re-conveyance to be at the expense of the defendant Lionel Robson. And any of the parties are to be at liberty to apply as &c. [See Usual Directions, No. XIX. *ante.*] *Stokoe v. Robson*, M. R. 16th June, 1815. Reg. Lib. B. 1814. fol. 1195. S. C. 19 Ves. 385.

NOTES.

(1) *Costs.*

On a bill by an indorsee of a lost bill of exchange, relief was given without costs. *Teresy v. Gory*, cited 1 Ves. 345.

On a bill for foreclosure the mortgage deed being lost by the plaintiff, he was decreed to pay the costs of the suit. *Stokoe v. Robson*, *supra*.

So, upon a bill for redemption, the deeds being lost by the defendant, redemption was decreed without costs. See Decree, in *Smith v. Bicknell*, 3 V. & B. 54. note.

(2) *Indemnity.*

At law an action cannot be maintained in the case of a lost bill or note upon an offer of indemnity, (except under the statutes 9 & 10 Wm. 3. c. 17. s. 3. and 3 & 4 Anne, c. 9.) See *Hansard v. Robinson*, 7 B. & C. 90. and cases there cited. And see *Walmsley v. Child*, 1 Ves. 345.

But in equity relief will be given upon an indemnity. S. Cs. *Davies v. Dodd*, 4 Price, 176.

So in bankruptcy, *Ex parte Greenway*, 6 Ves. 812.

So in the case of a lost bond, relief will be given in equity upon an indemnity. *East India Company v. Boddam*, 9 Ves. 464.

So in the case of the loss of mortgage deeds. *Stokoe v. Robson*, *supra*. *Shelmardine v. Harrop*, 6 Mad. 39.

The Court refers it to the Master to settle the terms of the indemnity. *East India Company v. Boddam*, 9 Ves. 467. And see *Davies v. Dodd*, *supra*.

So in bankruptcy it will be referred to the commissioners. *Ex parte Greenway*, 6 Ves. 813.

No. III.

DECREE WHERE WILL DESTROYED.

[The plaintiff was devisee of the premises at W. and an executor. The defendant Wood claimed under a settlement revoked by the will, and under an administration. The defendant Woodroffe was the other executor. The will had been destroyed.]

[*Inter alia*] Whereupon and upon long debate of the matter, and hearing the deed, dated &c., a paper marked &c. purporting to be a draft of the will of John Storer, and also a paper marked &c. purporting to be a draft of the deed poll recited in the said will, together with the proofs taken in the cause, read, and what was alleged &c. His Lordship doth think fit and so order and decree, that the defendant Wood do forthwith by a draft conveyance, to be settled by Mr. H. one &c. convey the premises at W. to the plaintiff Anthony Woodroffe and his heirs, and do also forthwith deliver to him the possession of the said pre-

mises, and do also deliver to him all deeds and writings relating thereto upon oath; and do also come to an account before the said Master for the rents and profits of the said premises at W. which have come to his hands, or to the hands of any other person for his use since the death of the said Anne Storer; and do also account for the personal estate of the said John Storer which hath come to his hands, or to the hands of any other for his use. For the better clearing of which said account, he is to be examined &c. [See Usual Directions, No. II. *ante*,] before the said Master, who in taking the several accounts is to make all just allowances; particularly out of the said personal estate, to make the defendant Wood an allowance for what debts of the said John Storer shall appear to have been paid by him the said Wood. And what upon the said accounts the said Master shall certify to be remaining in the said defendant Wood's hands of the rents and profits of the said premises at W. and also of the said personal estate after such allowances made as aforesaid, it is ordered, and decreed that the defendant Wood do pay the same to the said plaintiff Anthony Woodroffe. And the plaintiffs are to pay to the defendant John Woodroffe his costs of this suit, to be taxed by the said Master; and what costs the plaintiffs shall so pay to the said John Woodroffe, it is ordered that the defendant Wood do repay the same to the plaintiffs, and do also pay to the plaintiffs their costs of this suit, to be taxed by the said Master. *Woodroffe v. Wood*, L. C. 24th February, 1720. Reg. Lib. B. 1719. fol. 177. S. C. 1 Dick. 32.

NOTE.

Suppression of Instruments.

In the case of the suppression of an instrument a decree will be made for immediate relief, without directing an issue. *Woodroffe v. Wood*, *supra*. *Hampden v. Hampden*, 1 Dick. 26. *Hayne v. Hayne*, Ib. 18. S. C. 2 Vern. 441. *Garland v. Radcliffe*, 1 Dick. 11. *Bates v. Heard*, Ib. 4. *Askew v. Poulterers' Company*, 2 Ves. 90. *Clavering v. Clavering*, Ib. 233. *Atkins v. Farr*, 1 Atk. 287. S. C. 1 West,

589. *Sanson v. Rumsey*, 2 Vern. 561. *Eyton v. Eyton*, Ib. 380. S. C. Prec. in Ch. 116. 1 Bro. P. C. 151. *Finch v. Newnham*, 2 Vern. 216. *Cowper v. Earl Cowper*. 2 P. W. 748. *Dalston v. Coatsworth*, 1 P. W. 731.

Otherwise in the case of a lost instrument, No. I. note, *ante*.

So in the case of the suppression of a will of personal estate, the Court will decree immediate relief, without putting the plaintiff to proceed in the ecclesiastical court. *Woodroffe v. Wood*, *supra*. *Tucker v. Phipps*, 3 Atk. 359.

But where there was a question as to the validity of the suppressed instrument, the plaintiff was only put into a situation to proceed at law. *Seagrave v. Seagrave*, 13 Ves. 439.

To support the decree there must be proof of the existence of the instrument at a former period ; and this was formerly noticed in the decree. See *Cowper v. Earl Cowper*, *supra*. And *Rex v. Countess of Arundel*, there cited. *Woodroffe v. Wood*, *supra*.

DECREES RESPECTING SETTLEMENTS.

No. I.

DECREE DIRECTING SETTLEMENT PURSUANT TO WILL.

[The testator devised his estates upon trust to accumulate the rents and profits, until the second son of his nephew attained twenty-one, and then to convey to him and his issue male in strict settlement. In default of such issue, and in case of his death before twenty-one, upon like trusts for the third and other younger sons of his nephew; with a proviso that if any of them should succeed to his father's estate, the person next in remainder should take.

The second son attained twenty-one on the 23d January, 1804, having previously succeeded to his father's estate.

The bill was filed by his only son, claiming as tenant in tail under the will.

The representatives of the third son, who was dead, and other younger sons, claimed under the proviso.]

The second son who was heir at law, claimed the rents and profits from his attaining twenty-one, till the birth of the plaintiff, as undisposed of.

The rents and profits had been received by the third son after he attained twenty-one in February, 1805.]

This cause standing this day for judgment in the presence of counsel &c. and the defendant Sir Thomas Stanley Massey Stanley, the heir at law of the said testator by his answer admitting the said testator's will, his Honour doth declare that the said will ought to be established &c. [See Decrees respecting Real Assets, No. II. *ante*.] and doth declare that the plaintiff upon his birth became entitled

to an estate in tail male in the premises devised by the said will, and that the same ought to be settled accordingly, pursuant to the directions expressed in the said will. And it is ordered that it be referred to Mr. C. one &c. to approve of a settlement to be made of the said premises accordingly, and that all proper parties do join therein as the said Master shall direct. And doth declare that the rents and profits of the premises which accrued before the 23d day of January, 1804, when the defendant Sir Thomas S. M. Stanley attained twenty-one years, ought to be invested in the purchase of real estates according to the directions of the said testator's will; and that the defendant Sir Thomas S. M. Stanley, as heir of the said testator, is entitled to all such parts of those rents and profits, and of the dividends and interest of the securities in which the accumulated rents and profits were invested, and of the rents and profits of the estates purchased with the accumulated rents and profits, as accrued between the 23d day of January, 1804, and the 24th day of November, 1806, when the plaintiff was born; and that the plaintiff is entitled to all such of the said rents, and profits, and dividends, and interest, as have accrued since that day. And it is ordered that it be referred to the said Master, to take an account of the rents and profits of the said premises, which from the death of the said testator, up to the 18th day of February, 1805, have been received by Sir Thomas S. M. Stanley the elder, or by Dame Catharine Stanley his wife, or the defendants Sir Thomas S. M. Stanley, William Thomas Salvin, and Thomas Weld, or any or either of them, or by any other person or persons by the order or for the use of them, or any or either of them, distinguishing how much thereof accrued and was received prior to the 23d day of January, 1804, and how much after that day; and inquire how the same have been applied and disposed of, and in what securities the same or any parts thereof have been invested, and whether any, and what estates have been purchased therewith, or with any and what part thereof, and to whom such purchased estates were conveyed, and in whom the legal

Decrees respecting Settlements.

estate of the fee simple thereof is now vested. And it is ordered that it be referred to the said Master to inquire by what person or persons the dividends and interest of those securities, and the rents and profits of such purchased estates have from time to time been received, and to what amount, distinguishing how much thereof was received prior to the 23d day of January, 1804, and how much between the 23d day of January, 1804, and the 18th day of February, 1805, and how much between that day and the 24th day November, 1806, and how the same dividends and interest, and rents and profits, have been applied and disposed of. And it is ordered that it be referred to the said Master to take an account of the rents and profits of the premises devised by the said testator's will, which since the 18th day of February, 1805, were received by John S. M. Stanley, deceased, or by the defendants Sir Thomas S. M. Stanley, William Thomas Salvin, and Thomas Weld, or by any other person or persons, since his decease, distinguishing how much thereof accrued and was received prior to the 24th day of November, 1806, and how much since that day, and how the same have been applied and disposed of. And it is ordered that what on the said account of rents and profits shall appear to have been received by Sir Thomas S. M. Stanley the elder, in his lifetime, be answered by the defendants William Thomas Salvin, and Thomas Weld, his executors, out of his assets, they by their answer admitting (1) assets of the said testator. And it is ordered that what shall appear to have been received by the said Dame Catharine Stanley in her lifetime, be answered by the defendant William Thomas Salvin, her only acting executor, out of her assets, the said defendant by his answer admitting (1) assets of his said testatrix. And it is ordered that what shall appear to have been received by the defendants respectively, since the death of the said testatrix, be answered by them personally. And it is ordered that what shall appear to have been received by the said late defendant John S. M. Stanley in his lifetime, be answered by the defendants Sir Thomas S. M. Stanley, William Thomas Salvin, and Thomas

Weld, his executors, out of his assets, the said defendants by their answer admitting (1) assets of their said testator. And for the better taking the said accounts &c. [See Usual Directions, No. II. *ante.*] And it is ordered that the said Master do tax all parties their costs of this suit to this time. And his Honour doth reserve the payment thereof, and also the consideration of all further directions and subsequent costs until after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Stanley v. Stanley*, M. R. 11 December, 1809. Reg. Lib. B. 1809. fol. 461. S. C. 16 Ves. 491.

NOTE.

(1) See Decrees respecting Executors and Trustees, No. I. *post.*

No. II.

DECREE RECTIFYING MISTAKE IN SETTLEMENT.

It appearing that the said 500 years' term created for raising portions for the younger children of John Duke, deceased, and the defendant Mary his wife, is by mistake postponed after all the limitations in the said settlement, his Honour doth order and decree that the same be inserted next before the limitation in the said settlement to the first and other sons of the said John Duke and Mary his wife; and all proper parties are to join in every act necessary to be done for the rectifying the said mistake, as Mr. E. one &c. shall direct. And the plaintiffs are to pay unto the defendants Goldesborough and Hoffman the trustees, their costs of this suit, to be taxed by the said Master. But his Honour doth not give any costs between the other parties. And this decree is to be binding upon the defendant John Duke the infant, unless &c. [See Decrees respecting Infants, No. I. *post.*] *Duke v. Goldesborough*, M. R. 1st December, 1747. Reg. Lib. A. 1747. fol. 313.

NOTE.

See *Uvedale v. Halfpenny*, 2 P. W. 151. *Heneage v. Hunloke*, 2 Atk. 457. *Worsley v. Earl of Granville*, 2 Ves. 333.

No. III.

ORDER FOR REFERENCE, UNDER STAT. 7 GEO. IV.
C. 45. (TENANT IN TAIL ACT.)

This Court doth order that it be referred to the Master of this Court in rotation, to inquire (1) whether, under the act of parliament passed in the 7th year of the reign of his present Majesty, intituled, "An act for repealing an act passed in the 39th and 40th years of the reign of his late Majesty King George the Third," intituled "An act for the relief of persons entitled to entailed estates purchased with trust money, and for making further provisions in lieu thereof," the petitioner, John Fletcher Muckleston, would be tenant for life, and the petitioner, John Muckleston, tenant in tail, of the freehold or copyhold hereditaments, or both, to be purchased with the £—— navy 5*l.* per cent. annuities, since converted into new 4*l.* per cent. annuities, and the sum of £——, in the said petition respectively mentioned, in case the same were laid out in the purchase of freehold or copyhold hereditaments, or both, and whether there are any and what charges or other incumbrances (2) affecting the said trust monies. And the said Master is to state the result of the said inquiry, with his opinion thereon, to the Court: whereupon such further order shall be made as shall be just. In the matter of the act of parliament, &c. V. C. 2d April, 1828. Reg. Lib. B. 1827. fol. 1141. [Entered in Index, Ex parte Smyth.]

For order under former act, (39 and 40 G. 3. c. 56.) see 1 Turn. Pract. 617.

NOTES.

Tenant in Tail Act.—Reference.

(1) See order under stat. 6 G. 4. c. 74. Decrees respecting Executors and Trustees, *post*.

(2) There must be an inquiry, whether the parties have incumbered their interests. And this will not be dispensed with. Ex parte Hodges, 6 Ves. 576. And see Ex parte Bennet, 6 Ves. 116. Ex parte Frith, 8 Ves. 609. And see Ex parte Fortescue, 3 Russ. 130.

Final Order.

Where a recovery would have been necessary to bar the estate in the land, a direction should be inserted in the order, that it should have no effect, unless the tenant in tail should be living on the second day of the next term. See *Lowton v. Lowton*, 5 Ves, 12. note. *Ex parte Bennet*, 6 Ves. 117. *Ex parte Frith*, 8 Ves. 609.

If the Master finds that there are any charges affecting the fund, a transfer will be ordered, after providing for them. In re *Lord Somerville*, 2 S. & S. 470.

DECREES RESPECTING PARTNERS.

No. I.

DECREE FOR AN ACCOUNT OF PARTNERSHIP DEALINGS.

His Honour doth think fit and so order and decree, that it be referred to Mr. A. one &c. to take an account (1) of the partnership dealings between the plaintiff and the defendant, from the foot of the account, stated the 25th day of December 1736, except as to the item relating to the value of the lease of the house in question. And as to the said lease the said Master is to set a value thereon at the time of the dissolution of the partnership. For the better discovery whereof, &c. [See Usual Directions, No. II. *ante.*] (2) And what upon the balance of the said account shall appear to be due from either party to the other is to be paid accordingly (3). And the defendant is to pay unto plaintiff one moiety of the value that shall be set upon the said lease, as aforesaid; and thereupon the plaintiff is to release his interest therein to the defendant; and the defendant is to indemnify the plaintiff against the covenants contained in the said lease; which release is to be settled by the said Master, in case the parties differ about the same. And the consideration of the costs of this suit is hereby reserved until after &c. [See Usual Directions, No. XVII. *ante.*] *Talwin v. Stoker*, M. R. 22d July, 1742. Reg. Lib. B. 1741. fol. 339.

For order for taking account of partnership dealings by consent. See Hand's Pract. 71.

NOTE.

(1) *Account against Partners.*

A partner is not obliged to account for what he might have received without his wilful default. *Rowe v. Wood*, 2 J. & W. 556.

As to wilful default. See Decrees for Account generally, No. I. Note (6), *ante.*

(2) *Allowances.*

As to allowances. See Decrees for Account generally, No. I. Note (2), *ante*.

(3) *Payment of Balance.*

See Decrees for Account generally, No. I. Note (3), *ante*.

The decree is for payment in the first instance, without reserving further directions.

But in modern decrees further directions are usually reserved. See Reservation of Further Directions. Usual Directions, No. XV. *ante*.

No. II.

DECREE FOR ACCOUNT OF ASSETS OF DECEASED PARTNER.

[*Inter alia*] It is ordered, that the said Master do take an account of what was due at the time of the death of the said William Devaynes deceased, from the partnership of William Devaynes deceased, John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, to the plaintiff Sir Thomas Baring, as executor of John Wigglesworth in the said bill mentioned, and to Sir Frank Standish respectively; and also what was due to all such other persons as were the creditors of the partnership of William Devaynes, John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, at the time of the death of the said William Devaynes; and also an account of what is now due from the said last-mentioned partnership to the said plaintiff Sir Thomas Baring, as executor of the said John Wigglesworth, and to Sir Frank Standish respectively, and to all such other persons as were creditors of the same partnership at the time of the death of the said William Devaynes deceased. And the said Master is to compute interest &c. [See Decrees respecting Personal Assets, No. I. *ante*.] And it is ordered, that the said Master do inquire whether the said plaintiffs and creditors, or any or either and which of them, continued to deal with the said John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, after the death of the said William Devaynes, and what sum or sums of money were or was paid by the said surviving partners to the said

plaintiffs and creditors respectively, from the death of the said William Devaynes to the bankruptcy of the said surviving partners, and what has been since received by them respectively; and whether the said plaintiffs and creditors have, or any or either, and which of them hath, by such subsequent dealing released the estate of the said William Devaynes from the payment of their respective debts, or what, if any thing, remains due in respect thereof. And in making the aforesaid inquiries the said Master is to state any special circumstances to the Court, and to make a separate report, or separate reports, as he may think proper. And for the better taking the said accounts &c. [See Usual Directions, No. II. *ante.*] And his Honour doth reserve the consideration of all further directions until after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Baring v. Noble*, M. R. 2d March, 1812. Reg. Lib. A. 1811. fol. 915., S. C. 1 Mer. 530.

For inquiry as to subsequent profits made by continuing partners. See *Crawshay v. Collins*, 1 J. & W. 269. S. C. 15 Ves. 218. *Featherstonhaugh v. Fenwick*, 17 Ves. 314. *Brown v. Destastet*, Jac. 286. 298. *Cook v. Collingridge*, Jac. 624.

For orders as to allowances to continuing partners. See *Brown v. Destastet*, Jac. 299. *Cook v. Collingridge*, Jac. 625.

For inquiry whether an account of interest or profits most for the benefit of parties. See *Heathcote v. Hulme*, 1 J. & W. 134. *Burden v. Burden*, there cited.

NOTE.

A petition of appeal against this decree, and the orders consequent upon it, was presented on the following grounds:

1st. That it was not alleged in the bill, or proved, that the plaintiffs had proved under the commission against the surviving partners.

2d. That the insufficiency of the joint estate to pay the joint debts, though alleged by the bill, was neither admitted nor proved.

3d. That the bill only sought relief against the separate estate of

the deceased partner, and not against the separate estates of the bankrupts.

And contending either that the bill should be dismissed, or that the decree should be varied, by directing inquiries as to the sufficiency of the joint estate, and as to the separate estates of the bankrupts. [From the Petition of Appeal.]

Since the above appeal, an inquiry is sometimes directed as to the joint estate. See *Fisher v. Farrington*, Appendix (1).

APPENDIX (1).

Minutes of Decree against Assets of deceased Partner.

Declare, that the surplus of the estate, real and personal, of the testator Edmund Battersbee, after satisfying his funeral and testamentary expenses, and his separate debts, was liable, in equity, at the time of his death, to the joint debts then due from the firm of Battersbee and Morris, in aid of the joint estate of that firm; but without prejudice to the liability of the said William George Morris thereto, as between the said William George Morris and the said testator. Refer it to the Master, to whom the cause of Battersbee and Farrington stands referred, to take an account of what was due at the death of the said testator, from the partnership of Battersbee and Morris to the plaintiffs, and the other creditors of that partnership, who shall come in and contribute to expenses of this suit, and what is now due in respect of such debts, and to insert advertisements &c. And let the Master inquire whether the joint estate of the said firm of Battersbee and Morris was, or not, sufficient for the payment of the joint debts due from the said firm at the death of the said testator; such inquiry to be without prejudice to any question as to the rights of the joint creditors, in case it shall appear, that at the decease of the said testator, the said joint estate was sufficient for the payment of the said joint debts. And let him inquire whether the plaintiffs, and such other creditors as aforesaid, or any and which of them, continued to deal with William George Morris, after the death of the said testator, and what sums were paid by Morris to the plaintiffs and such other creditors, from the death of the said testator to the bankruptcy of Morris; and when such bankruptcy happened; and what has been received by them or any of them since such bankruptcy; and whether by such subsequent dealings, or otherwise, the estate of the said testator has

become discharged from any such liability as may have existed at the time of his death to the respective debts of the plaintiffs, and such other creditors, or any and which of them ; or what (if any thing) is due from the said testator's estate in respect thereof. And in making the aforesaid inquiries, let the Master state any special circumstances And let him entitle his report in this cause, and also in the said cause of *Battersbee v. Farrington*. And these proceedings are not to interfere with the payment of the separate debts of the testator in the said cause of *Battersbee v. Farrington*, nor with any order for payment of the costs of that suit ; but further directions in that suit, subsequently to the payment of the said separate debts and costs, and also in this cause, and the consideration of the costs of this cause, are reserved, until the Master shall have made his report. With liberty to apply. *Fisher v. Farrington, ex relatione Mr. Tinney.*

No. III.

DECREE FOR ADMINISTRATION OF JOINT AND SEPARATE ESTATES.

His Lordship doth think fit, and so order and decree, that it be referred to Mr. B. one &c. to take an account of the partnership estate come to the hands of the said defendants Boyle, Piercey, and Mason, the assignees of the said defendants Shewell and Masterman, the bankrupts, or of the said defendant Whitmore, who did not become a bankrupt, or any of them, or to the hands of any other person or persons, by their or any of their order, or for their or any of their use. And it is ordered, that the said Master do also take an account of the partnership debts, down to the time the said defendants Shewell and Masterman became bankrupts. And the plaintiff, and all other the creditors of the said partnership, are to be at liberty to come in and receive a dividend under the said commission, in proportion to their debts. And for that purpose the said Master is to cause an advertisement, &c. [See Decrees respecting Personal Assets, No. I. *ante.*] And it is ordered, that the said partnership estate be applied in payment of such partnership debts. And the surplus is to be

divided into three equal parts, and two third parts thereof are to be paid to the said defendants the assignees, to be by them applied in discharge of the separate debts of the said defendants Shewell and Masterman the bankrupts, and the remaining third part thereof is to be paid to the said defendant Whitmore. And it is ordered, that the said Master do likewise take an account of the separate estate of the said defendants Shewell and Masterman, the bankrupts, come to the hands of the defendants Boyle, Piercey, and Mason, the assignees, or any of them, or to the hands of any other person or persons, by their or any of their order, or for their or any of their use. And the said Master is also to take an account of the separate debts of the said defendants, the bankrupts. And it is ordered, that such separate estate of the said defendants Shewell and Masterman, the bankrupts, be applied by the said defendants, the assignees, first in discharge of such separate debts, and then in payment of the partnership debts remaining unsatisfied; the said defendant Whitmore, contributing one-third part thereof. And in case there shall be any surplus of such separate estate, the same is to be paid to the said defendants Shewell and Masterman. And for the better taking the several accounts before directed &c. [See Usual Directions, No. II. *ante.*] And his Lordship doth not think fit to give any costs on either side. *Davies v. Boyle*, L. C. 25th April, 1763. Reg. Lib. A. 1762. fol. 563.

For minutes of same decree. See 2 Newl. Pract. 325. And see *Hankey v. Garratt*, 3 Bro. 457. S. C. 1 Ves. jun. 236. *Richardson v. Gooding*, 2 Vern. 293. *Countess of Craven v. Knight*, 2 Ch. Rep. 226.

NOTE.

It was formerly held, that the joint estate possessed by the assignees under a separate commission could not be administered under it where there was a solvent partner, except on a bill filed. See *Hankey v. Garratt*, 3 Bro. 458.

But it is now done on petition. *Ex parte Aspinwall*, C. B. L. 247. and cases there cited. *Everett v. Backhouse*, 10 Ves. 98. *Dutton v. Morison*, 17 Ves. 209.

Decrees respecting Partners.

The separate estate is distributed under a joint commission by the general order of the 8th March, 1794. 2 C. B. L. 287.

A joint creditor of the testator and another person was permitted to prove in a suit for the administration of the assets of the testator, the other debtor having become bankrupt, and there being no joint property. *Cowell v. Sikes*, 2 Russ. 191. And see *Gray v. Chiswell*, 9 Ves. 118. And Decrees respecting Personal Assets, No. I. note (1), *ante*.

DECREES RESPECTING SURETIES.

No. I.

DECREE FOR CONTRIBUTION AGAINST SURETY AND INDEMNITY FROM PRINCIPAL.(1)

[The plaintiff's testator Thomas Wright, and the defendant George Wright, were co-sureties for the defendant Watson in an agreement for a lease of tolls. Upon the default of Watson, the plaintiff's testator had been compelled to pay. The bill charged that Watson was insolvent, and prayed for contribution.]

His Honour doth order and decree, that it be referred to Mr. E. one &c. to take an account of all sums of money paid by Thomas Wright deceased, in the pleadings named, and the plaintiffs Ann Lawson and Thomas Wright his executors, or any of them, agreeable to the undertaking in the pleadings mentioned, dated &c. and compute interest on such sums of money, at the rate of 4l. per cent. per annum, from the times the several payments were made, and tax the plaintiffs their costs of this suit. And it is further ordered, that the defendant George Wright do pay (2) unto the plaintiffs one moiety of what shall be found due for principal and interest as aforesaid, together with their costs of this suit. And it is further ordered, that the defendant George Watson do pay unto the plaintiffs the other moiety of what shall be found due for principal and interest as aforesaid, and do also pay unto the defendant George Wright the principal and interest before directed to be paid by him to the plaintiffs, together with the costs of the said defendant George Wright, to be taxed by the said Master, and also the costs which he shall pay unto the plaintiffs under the direction before given. And

for the better taking of the said account &c. [See Usual Directions, No. II. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Lawson v. Wright*, M. R. 14th November, 1786. Reg. Lib. B. 1786. fol. 51. S. C. 1 Cox, 275.

NOTES.

(1) *Decrees relating to Sureties.*

On a bill by a surety for contribution, the principal will be decreed to indemnify the plaintiff and his co-surety. *Lawson v. Wright*, *supra*.

So upon a bill by the creditor against the principal and surety, and a decree against the surety; leave will be given to the surety to prosecute the decree against the principal for indemnity. *Walker v. Preswick*, 2 Ves. 622. And see Further Directions, No. II. *post*.

So upon a bill by co-sureties, and a decree against them, leave will be given to prosecute the decree against the principal for indemnity, and against each other for contribution. See Decree in *Greenside v. Benson*, 3 Atk. 253, note.

(2) The decree is for payment in the first instance, without reserving further directions. See Reservation of Further Directions, Usual Directions, No. XV. *ante*.

No. II.

DECREE ON FURTHER DIRECTIONS FOR INDEMNIFYING SURETY.

[By the original decree the defendant Godfrey was ordered to pay what should be found due from him to the plaintiffs, at such time as the Master should appoint; in default of which, the defendants Woolball and wife were to pay it; and the consideration how far they might be entitled to stand in the place of the plaintiffs, and to have the benefit of the decree against Godfrey, was reserved.]

It appearing to the Court that the defendant Woolball and his wife have paid to the plaintiffs what was reported due to the plaintiffs by the Master's report, dated the 14th day of May last, for their demands and costs of this suit, his Lordship doth declare that the defendant Godfrey ought to indem-

nify the defendants Woodball and his wife, in respect of such payment, and to reimburse them what they have so paid. And it is further ordered that the defendants Woolball and wife be at liberty to prosecute the said decree against the defendant Godfrey, in the names of the plaintiffs, in order to recover against the said defendant Godfrey, what they have so paid to the plaintiffs; and the said defendants Woolball and his wife are to be at liberty to make use of the names of the plaintiffs for that purpose; the said defendants Woolball and his wife indemnifying the plaintiffs against any costs or damages they may be liable to on that account. *Weston v. Woolball*, L. C. 17th January, 1747. Reg. Lib. B. 1746. fol. 439.

DECREES RESPECTING EXECUTORS AND TRUSTEES.

No. I.

DIRECTION IN DECREE WHERE EXECUTORS ADMIT ASSETS.

And it is further ordered, that such part of the personal estate of the said testator, as shall upon the said account appear to have come to the hands of the said Tyndal, be answered by the defendants Richardson and Appleton, his executors, they having admitted assets of their said testator. *Hargrave v. Richardson*, L. C. 9th July, 1753. Reg. Lib. A. 1752. fol. 566. S. C. 1 Bro. 136. note.

No. II.

WHERE ASSETS NOT ADMITTED.

And what shall appear to have been received by the said James Hunt the son, of the said James Hunt the father's personal estate, is to be answered by the said defendants Fowke and Threlkeld his executors out of his assets in a course of administration. And if they shall not admit assets of the said James Hunt the son before the Master, then they are to come to an account before the said Master for his personal estate received by them or either of them, or by any other person, by their or either of their order, or for their or either of their use. *Bowen v. Prentis*, L. C. 9th November, 1747. Reg. Lib. A. 1747. fol. 113.

NOTE.

Further Directions.

In *Attorney-General v. Cornthwaite*, 2 Cox, 45. the executors not having admitted assets, and an account having been taken of the personal estate received by them, but not of the debts, the Lord Chancellor directed the Master to review his report, and state whether the balances respectively found due from the defendants the executors, would, by reason of any specialty or other debts due from the testator, be the respective balances coming from them, to be applied in a course of administration.

It seems, therefore, that if assets are not admitted, the account should be taken as in a creditor's suit.

No. III.

**DIRECTION IN DECREE AGAINST EXECUTORS,
CHARGING THEM WITH INTEREST ON BALANCES.**

And the said Master is to take an account of the monies and estate of the said testator, which remained in the hands of his executors, or either of them, unapplied, at the end of twelve months from his death ; and also an account of all sums of money received by them or either of them, or by any other person or persons by their or either of their order, or for their or either of their use (1) subsequent to that time ; and is to compute interest at the rate of 4*l.* per cent. per annum on the balances in their or either of their hands at the end of the said twelve months. And the said Master, in taking the said accounts, is to make half-yearly rests (2); and charge the said defendants with interest after the rate aforesaid, upon the balances which shall appear from time to time to have been in their hands respectively. *Smith v. Wilkinson*, L. C. 9th February, 1798. Reg. Lib. B. 1797. fol. 363.

For minutes of same decree. See 2 Newl. Pract. 335.

NOTES.

(1) *Wilful Default.*

In *Bulstrode v. Bradley*, 3 Atk. 582. it is said, that it is the constant practice of the Court in decrees against executors to account,

Decrees respecting Executors and Trustees.

to direct them to account for what they have received, or might have if it had not been for their own default. And see *Anon.* 2 Mad. Chan. 457. note. And what is said in *Palmer v. Jones*, 1 Vern. 144. But this is not the practice, unless upon a special case made for that purpose. See *Shepherd v. Towgood*, Turn. 388. *Pybus v. Smith*, 1 Ves. jun. 193.

For further as to wilful default. See *Decrees for Account*, No. I. note (6), *ante.* *Decrees respecting Partners*, No. I. note (1), *ante.* *Decrees respecting Mortgages*, No. IV. note (1), *ante.* *Decrees for Specific Performance*, No. II. note (3), *ante.*

(2) Rests.

In *Tebbs v. Carpenter*, 1 Mad. 301. 303. it seems to have been thought that *Raphael v. Boehm*, 11 Ves. 92. was the first case in which compound interest was given. But see *Smith v. Wilkinson*, *supra.* The decree in *Raphael v. Boehm* was on the 26th of July following. See 11 Ves. 94.

For further as to rests. See *Decrees for Account*, No. I. note (6), *ante.* *Decrees respecting Mortgages*, No. IV. note (4), *ante.* *Decrees for Specific Performance*, No. II. note (3), *ante.* And see *Decrees for setting aside Deeds*, No. I. note (3), *ante.*

Further Directions.

Inquiries with a view to charge executors with interest are usually granted on further directions only. See *Law v. Hunter*, 1 Russ. 105. But they may be obtained at the original hearing upon a special case. *Ibid.* And see *Hockley v. Bantock*, 1 Russ. 142. *Smith v. Wilkinson*, *supra.*

They will not be granted upon petition, though brought on with the cause for further directions. *Parnell v. Price*, 14 Ves. 502. And see *Bruere v. Pemberton*, 12 Ves. 386. and *Reservation of Interest*, Usual Directions, No. XVI. *ante.*

That the payment of interest on balances retained by an executor will be enforced against his assets. See *Tebbs v. Carpenter*, 1 Mad. 290. *Rocke v. Hart*, 11 Ves. 58. *Young v. Coombe*, 4 Ves. 101. *Foster v. Foster*, 2 Bro. 616. *Barwell v. Parker*, 2 Ves. 365.

So against a bankrupt or insolvent estate. See *Dornford v. Dornford*, 12 Ves. 127. *Pearse v. Green*, 1 J. & W. 135. *Moons v. De Bernales*, 1 Russ. 301.

Costs.

For the cases in which executors or trustees are allowed costs. See *Beames on Costs*, §8. 146.

For cases in which they are not. See Ib. 90. 149.

For cases in which they have been made to pay costs. See Ib. 91. 150.

That where trustees are allowed costs, it is usually as between solicitor and client. See Ib. 157. 216.

That where a bill is dismissed against a trustee, it is with costs as between party and party. See Ib. 158. *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112.

It seems that executors are not entitled to their charges and expenses without an express direction, as they are presumed to retain them. See *Humphrys v. Moore*, 2 Atk. 108.

But it seems that trustees are entitled to their charges and expenses without an express direction, under the head of suit allowances. See *Fearn v. Young*, 10 Ves. 184.

It is, however, usual to give express directions for allowing them.

No. IV.

DECREE FOR APPOINTMENT OF NEW TRUSTEES.

His Honour doth think fit and so order and decree that it be referred (1) to Mr. S. one &c. to approve (2) of two new trustees in the room of the said defendant. And it is ordered and decreed, that the said defendant do assign and transfer the trust estate vested in her by the said indentures, and also the £—— South Sea annuities mentioned in her answer, to such new trustees to be approved of by the said Master, upon the same trusts, and subject to the trusts mentioned in the said indenture of release, dated the 9th of January, 1728; and such assignment is to be settled by the said Master, in case the parties differ about the same. And it is ordered and decreed, that the said defendant do deliver over to such new trustees all deeds and writings in her custody or power relating to the said trust estate. And it is ordered that the plaintiffs do pay unto the defendant her costs of this suit, to be taxed by the said Master. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Luther v. Chamberlen*, M. R. 1st July, 1748. Reg. Lib. B. 1747. fol. 356.

For orders for appointment of new trustees in charity cases. See Equity Draftsman, 661.

NOTES.

(1) *Reference.*

It seems that ordinarily the Court will not appoint a trustee without a reference to the Master whether the person proposed is a proper person. See *O'Keefe v. Calthorpe*, 1 Atk. 18.

In the case of a charity, a reference will not be dispensed with. *Attorney General v. Earl of Arran*, 1 J. & W. 229.

Where the surviving or continuing trustees have the power to appoint, if they will not exercise it without coming to the Court, there must be a reference. — *v. Roberts*, 1 J. & W. 251.

That the Court will control a trustee in the exercise of the power of appointing a new trustee, though given in large terms. See *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

On the appointment of new trustees, the Court refused to insert in the deed a provision for the appointment of future trustees, there being no such provision in the trust deed. *Bayley v. Mansell*, 4 Mad. 226.

But it seems that in a charity case such a provision will be permitted. *Attorney General v. Hurst*. Decrees respecting Real Assets, No. XV. *ante*.

In the case of a charity, the trustees being annual officers, new trustees were appointed for the receipt of the funds, which consisted of dividends of stock, but the objects of the charity were to be selected by the original trustees. *Ex parte Blackburne*, 1 J. & W. 297.

(2) *Appointment.*

The usual direction is that the Master shall approve. *Luther v. Chamberlen*, *supra*.

But sometimes the direction is that he shall appoint. *Attorney General v. Earl of Arran*, 1 J. & W. 229. *Millard v. Eyre*, L. C. 27th November, 1793. Reg. Lib. B. 1792. fol. 292. S. C. 2 Ves. jun. 94. And see *Buchanan v. Hamilton*, 5 Ves. 722.

See Decrees respecting Receivers, No. I. note (1), *post*. And see Order for Guardian, Decrees respecting Infants, No. VIII. *post*.

In *Attorney General v. Earl of Arran*, *supra*, it seems to have been thought, that but for the use of the latter direction, it would have been necessary to come back to the Court for further directions. But see *Luther v. Chamberlen*, *supra*.

No. V.

DECREE AGAINST TRUSTEES FOR ACCOUNT
OF CHARITY ESTATES, AND INQUIRY AS
TO LEASES.

His Honour doth order and decree, that it be referred to Mr. S. one &c. to inquire what were the estates subject to the charitable uses created by the deeds dated &c. in the pleadings stated. And it is ordered, that the said Master do take an account of the rents and profits of such estates, and of the fines taken for the renewals of the leases thereof, come to the hands of the defendants, or any person or persons by their order or for their use, and to state at what times such fines were received, and in what manner the same and the rents and profits have been applied. And it is ordered that the said Master do inquire whether the said estates have been properly let; and if he shall be of opinion that the same have not been properly let, he is to inquire whether it will be proper to take any, and if any, what steps to set aside the leases so improperly made; and he is to state his opinion thereon to the Court. And it is ordered, that the said Master do approve of a scheme &c. [See Decrees respecting Real Assets, No. XV. *ante.*] And it is ordered, that the said Master do appoint proper persons to be feoffees or trustees of the charity estates; and inquire in whom the legal estate therein is vested. And for the better taking the said account &c. [See Usual Directions, No. II. *ante.*] And it is ordered that the said Master do tax the relator his costs of this suit to the time, and make a separate report thereof; and it is ordered, that such costs when taxed be paid by the defendants out of the money in their hands on account of the charity estates. And his Honour doth reserve the consideration in what manner, the same shall ultimately be paid, and also the consideration of all further directions, and of the rest of the costs of this suit, until after the said Master shall have made his general report. (1) And any of the parties are to be at liberty to

Decrees respecting Executors and Trustees.

apply &c. [See Usual Directions, No. XIX. *ante.*] Attorney-General v. Corporation of Exeter, M. R. 22d March, 1813. Reg. Lib. A. 1812. fol. 698.

Affirmed on rehearing. S. C. M. R. 7th March, 1822. Reg. Lib. A. 1821. fol. 1132.

NOTE.

(1) See Usual Directions, No. XV. *ante.*

Further Directions.

On setting aside a lease by trustees of charity estates, the Court directs the lease to be cancelled *in toto*, and will not reserve to the lessee the benefit of the covenants of the lessors. Attorney-General v. Morgan, 2 Russ. 306.

No. VI.

ORDER UNDER STATUTE 6 GEO. 4. C. 74.
(LUNATIC TRUSTEE ACT.)

This Court doth order that it be referred to the Master of this Court in rotation, to inquire (1) and state to the Court whether Nathaniel Nicholls in the said petition named, is a trustee of the £——, £3 : 10s. per cent. reduced annuities, in the said petition stated to be standing in the names of Christopher Doyly, Nathaniel Nicholls, and Charles Bicknell, and for whom, within the intent and meaning of the Act of Parliament, passed in the sixth year of the reign of his present Majesty, entitled “An Act for consolidating and amending” &c. And in case the said Master shall find that the said Nathaniel Nicholls is such trustee as aforesaid, then it is ordered, that the said Master do inquire and state to the Court whether the said Nathaniel Nicholls is a person of unsound mind. And after the said Master shall have made his report, such further order shall be made as shall be just. In re Smith, V. C. 2d April, 1828. Reg. Lib. B. 1827. fol. 973.

For orders under stat. 7 Anne, c. 19. (the Infant Trustee Act, repealed by stat. 6 Geo. 4. *supra*). See 1 Turn. Pract. 405. 2 Fowl. 424.

For orders for confirming report under stat. 7 Anne. See 1 Turn. Pract. 407. 2 Fowl. 433. Equity Draftsman, 613.

For order for reference under stat. 29 Geo. 2. c. 31. (for enabling infants &c. to surrender leases). See *Ex parte Swan*, 2 Dick. 749.

NOTE.

(1) It seems that under these and all similar acts, there must be a reference in the first instance, to inquire whether the party is within the meaning of the act. See *Ex parte Swan*, 2 Dick. 749. And see *Decrees respecting Settlements &c. No. III. ante.*

It seems that the order for a reference under the statute 6 Geo. 4. *supra*, (as under the statute 7 Ann, *supra.*) may be obtained as of course. 1 Turn. Pract. 405. 616.

So in the Exchequer, 2 Fowl. 424.

Final Order.

Exceptions do not lie to reports under these and similar statutes. But the report is brought before the Court upon petition, when the Court will either confirm it and give the consequential directions, or refer it back to the Master to be reviewed. See *Price v. Shaw*, 2 Dick. 732. *Ex parte Swan*, 2 Dick. 749. *Ex parte Burton*, 1 Dick. 395.

Costs.

Until the time of Lord Roslyn costs were neither prayed nor directed by the orders made for confirming the report, and for a conveyance pursuant to the statute 4 Geo. 2. c. 10. (the Lunatic Trustee Act, repealed by statute 6 Geo. 4. *supra.*) the rule being for the party seeking the conveyance to pay the costs. See *Certificate of Secretary of Lunatics*, Turn. 326.

So the costs of an infant trustee under the statute 7 Ann. c. 19. were directed to be paid by the petitioner. *Ex parte Cant*, 10 Ves. 554.

In *Ex parte Brydges*, Coop. 290. the costs of a lunatic trustee under the statute 4 Geo. 2. c. 10. were directed to be paid out of the lunatic's estate.

So in *Ex parte Richards*, 1 J. & W. 264. the costs of the Committee of a lunatic mortgagee, under the same statute, were ordered to be paid out of the lunatic's estate.

But in *Ex parte Pearse*, Turn. 325. the Lord Chancellor declared the general rule to be that the costs of a committee of a

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lunatic trustee conveying under the statute, must be paid by the *cestui qui* trust. And see *Ex parte Tuffnell*, cited *Ib.* 327. and 1 J. & W. 265.

By the statute 6 Geo. 4. c. 74. s. 17. The Court may order the costs to be paid out of the fund, as it thinks fit.

DECREES RESPECTING FÈMES COVERT.

No. I.

DECREE ON CONSENT OF FÈME COVERT.(1) INTRODUCTORY PART.

Whereupon and upon debate of the matter, and hearing the said testator's will &c. read, and what was alleged &c. and the plaintiff Jane Heylyn being now present in court and examined, consenting (2) that her share (3) of the said new South Sea annuities shall be transferred to Edward Heylyn her husband, his Honour doth order and decree that &c. *Trubshaw v. Skeppard*, M. R. 30th March, 1747. Reg. Lib. B. 1746. fol. 213.

For order for payment to husband on consent of wife. See Hand's Pract. 213.

NOTES.

(1) *Effect of Decree as to Fême Covert.*

Fême Covert Plaintiff.

Where a suit is instituted by the husband and wife, in right of the wife, and the husband dies before a decree, the wife is not liable to costs, if she does not continue the suit. Lord Redesdale, 47. She may however continue it, without filing a bill of revivor. See Lord Redesdale, *Ib.* Anon. 3 Atk. 726. *Backhouse v. Middleton*, Freem. 133. *Pary v. Juxon*, 3 Chan. Rep. 40. But see *Parrott v. Randall*, Cary, 70. Or she may bring a new bill. Anon. 2 Vern. 197.

If the husband dies after a decree, but before he has obtained possession of the property, it will survive to her. *Nanny v. Martin*, 1 Ch. Rep. 233. S. C. Freem. 172. *Nightingale v. Lockman*, Mos. 230: 390. And see *Oglander v. Batson*, 1 Vern. 396. *Coppin*

Decrees respecting Fêmes Covert.

v. ———, 2 P. W. 496. Bond v. Simmons, 3 Atk. 20. Garforth v. Bradley, 2 Ves. 677. Macaulay v. Philips, 4 Ves. 15. Johnson v. Johnson, 1 J. & W. 472. Hore v. Woulfe, 2 Ba. & Be. 424. But see Packer v. Wyndham. Pre. in Ch. 412. Forbes v. Phipps, 1 Eden, 502. Heygate v. Annesley, 3 Bro. 362. 1 Fonbl. 315. note.

Fême Covert Defendant.

Where husband and wife are sued jointly in right of the wife, and the husband dies before a decree, it seems that the wife is bound by the proceedings during his life. See Mole v. Smith, 1 J. & W. 665. Shelberry v. Briggs, 2 Vern. 249. But see Anon. 3 Salk. 84. Gilb. For. Rom. 161.

Otherwise where, upon the death of the husband, she acquires a new interest. Mole v. Smith, *supra*.

By a decree she is as much bound as a fême sole, and is not, like an infant, entitled to a day to show cause against it. Burke v. Crosbie, 1 Ba. & B. 502, 3. Mallack v. Galton, 3 P. W. 352. But see Gilb. For. Rom. 161.

(2) Consent.

The word “desiring” is sometimes added. See Willatts v. Cay, 2 Atk. 67. note. Hand’s Pract. 219.

In some cases the Court has refused to take the consent of the wife. See Wright v. Rutter, 2 Ves. jun. 677. Ex parte Higham, 2 Ves. 579.

But it seems that the Court cannot refuse to take it, if she persists. Wright v. Rutter, *supra*.

For Waiver of Settlement. See No. IV. note (1), *post*.

(3) The Court will not take the consent of the wife till the amount of the fund is ascertained. Sperling v. Rochfort, 8 Ves. 178. Woollands v. Crowcher, 12 Ves. 178. Jernegan v. Baxter, 6 Mad. 32.

Nor where the amount is in part ascertained, if it is in part unascertained. Godber v. Lawrie, 10 Price, 152.

Formerly where the sum exceeded 100*l.* consent would not be dispensed with. Bourdillon v. Adair, 3 Bro. 237. But now where the sum is under 200*l.* or 10*l.* a year, consent will be dispensed with. Elworthy v. Wickstead, 1 J. & W. 69. And see Payment out of Court, Usual Directions, No. XIII. note (2), *ante*.

Upon an application for payment to the husband, with the consent of the wife, there must be an affidavit that there is no settlement

on the marriage, or that it does not affect the fund. See *Minet v. Hyde*, 2 Bro. 663.

So where the consent of the wife is dispensed with. See *Payment out of Court*, Usual Directions, No. XIII. *ante*.

No. II.

ORDER FOR TAKING THE CONSENT OF A FEME
COVERT BY COMMISSIONERS.

Upon opening the matter this present day unto this Court by Mr. Y. being of counsel for E. E. and the plaintiff S. his wife, it was alleged that &c. It was therefore prayed that &c. Whereupon and upon hearing the said decree &c. read, and what was alleged by the counsel for the said parties, and it being alleged that the said E. E. and the said plaintiff S. his wife live and reside in N. in the county of G. this Court doth order that the said plaintiff S. E. do attend M. R. &c. Esqrs. or any two of them, and declare before them by writing under her hand, whether she does consent that her moiety of the said £——, old South-Sea annuities, shall be transferred to the said E. E. her husband. And they, or any two of them, are desired to examine her separate and apart from the said E. E. her husband, concerning the same; and to attest, under their hands, such declaration in writing as shall be made and signed by her. And it is further ordered, that the signing of the said plaintiff S. E. and the attestation of the said M. R. &c. or any two of them, be verified by affidavit, to be made before a Master in Chancery extraordinary in the country, and thereupon such further order shall be made as shall be just. *Walford v. Walford*, M. R. 21st July, 1747. Reg. Lib. B. 1746. fol. 424.

For like order. See *Equity Draftsman*, 614.

NOTE.

For the mode of proceeding when parties are abroad. See *Minet v. Hyde*, 2 Bro. 663. *Parsons v. Dunne*, 2 Ves. 60. And see *Bourdillon v. Adair*, 3 Bro. 237. *Campbell v. French*, 3 Ves. 321.

No. III.

ORDER UPON THE RETURN OF THE COMMISSIONERS.

Upon opening the matter this present day unto this Court by Mr. Y. being of counsel for the said E. E. and the plaintiff S. his wife, it was alleged that by an order of the 30th of July, 1743, it was among other things ordered that &c. That by an order of the 21st of July last, it was ordered that &c. pursuant to which said last-mentioned order the said S. E. attended the said M. R. and W. R. on the 25th day of September last at C. in the county of G. separate and apart from the said E. E. her husband, and did voluntarily and freely declare before them, by writing under her hand, that she consented that her moiety of the said sum [of £—— old South Sea annuities should be transferred to her husband the said E. E. as by the certificate of the said M. R. and W. R. appears. And that it also appears by the affidavit of H. L. of C. aforesaid, gent. that the declaration in writing aforesaid was signed and subscribed by the plaintiff S. E. in his sight and presence, and that the name of the said S. E. set or subscribed at the foot of the said declaration is of the proper handwriting of the said S. E. and that the names or characters of the said M. R. and W. R. wrote and subscribed to the attestation aforesaid are of the several handwritings of the said M. R. and W. R. and were severally wrote and subscribed by them in the presence of the said H. L.; and therefore it was prayed, that the Accountant-General of this Court may transfer to the said E. E. the husband of the plaintiff S. E. £—— old South Sea annuities, being one moiety of the said £—— old South Sea annuities standing in his name in trust in this cause; which upon hearing the said order of the 21st day of July last, and the said order of the 30th day of July, 1743 read, is ordered accordingly. *Walford v. Walford*, L. C. 12th November, 1747. Reg. Lib. B. 1747. fol. 18.

For the form of the commissioners' return. See *Tasburgh's case*, 1 V. & B. 507. 2 Turn. Pract. 83.

No. IV.

DIRECTION FOR SETTLEMENT ON WIFE.

And it is ordered that the said Master do inquire and state to the Court, whether the plaintiff Radburn Clarke has made any settlement on, or provision for the plaintiff Sarah his wife, and the issue (1) of their marriage; or entered into any agreement for that purpose. And in case the said Master shall find that he has not, or having made any such, the said Master should not approve the same, then it is ordered that the said plaintiff Radburn Clarke be at liberty to lay proposals before the said Master for that purpose. And it is ordered that the said Master do state the same with his opinion thereon to the Court. (2) *Clarke v. Woodward*, M. R. 27th February, 1819. Reg. Lib. A. 1818. fol. 786.

For like Order. See Hand's Pract. 217.

NOTES.

(1) Settlement on Issue.

Where money has been carried over to the account of a married woman, it has been the constant habit of the Court, without any application by her, to direct an inquiry whether any settlement has been made, and to direct a settlement, not upon the wife only, but upon the children also. See *Murray v. Lord Elibank*, 13 Ves. 6. S. C. 10. Ves. 90. *Lloyd v. Williams*, 1 Mad. 457. *Johnson v. Johnson*, 1 J. & W. 480. *Grosvenor v. Lane*, 2 Atk. 180.

Waiver of Settlement.

The issue have no equity independently of the wife, except by contract, or under the decree. *Lloyd v. Williams*, 1 Mad. 450. and cases there referred to.

This equity being personal to the wife, may be waived by her, both as to herself, and her children, notwithstanding the decree. See *Lloyd v. Williams*, 1 Mad. 458. *Steinmetz v. Halthin*, 1 G. & J. 64.

In *Anon.* 2 Ves. 671. it was held by Lord Hardwick, that it could not be waived by her after a proposal made by the husband before the Master, but not carried into effect. And see what is said by the Master of the Rolls in *Murray v. Lord Elibank*, 13 Ves. 6.

But in *Murray v. Lord Elibank*, 10 Ves. 88. the Lord Chancellor said that it was competent to the wife to waive it up to the moment of its completion. And see *Steinmetz v. Halthin*, *supra*.

Where there had been an agreement between the trustee and the husband for a settlement on the wife, it was held to enure to the benefit of the issue, and that she could not waive it. *Fenner v. Taylor*, 1 Sim. 169.

So where she claims her equity against the assignees of her husband. *Barker v. Lea*, 6 Mad. 330.

If the wife does not waive it, it is binding upon the husband after a decree, notwithstanding her death. *Murray v. Lord Elibank*, 13 Ves. 1. S. C. 10 Ves. 84. *Martin v. Mitchel*, cited, Ib. And *Rowe v. Jackson*, cited, Ib. S. C. 2 Dick. 604.

In *Steinmetz v. Halthin*, *supra*, it was held to attach on the filing of the bill and whether filed by the wife or others. But see *Lloyd v. Williams*, *supra*.

It is not binding upon the wife in case of the death of the husband, though after a decree. *Phipps v. Earl of Anglesea*, 1 Fonbl. 97. note. *Murray v. Lord Elibank*, 10 Ves. 91.

Nor is the wife bound by an agreement with her husband under the decree, not approved by the Court. *Macaulay v. Philips*, 4 Ves. 15.

If the agreement had been approved by the Court, and a settlement ordered to be made, the Master of the Rolls thought that she would have been bound. S. C. But see *Murray v. Lord Elibank*, 10 Ves. 88.

(2) *Special Directions.*

Where the husband has received any part of the property of the wife, or has made any settlement upon her, a settlement will be directed, regard being had to the extent of the wife's fortune, and the settlement already made upon her. *Green v. Otte*, 1 S. & S. 250. And see *Lady Ellibank v. Montolieu*, 5 Ves. 744. *Bond v. Simmonds*, 3 Atk. 20.

No. V.

DECREE FOR DOWER IN FREEHOLD AND
COPYHOLD LANDS.

[*Inter alia*] His Lordship doth order (1) that it be referred to the said Master (2) to inquire what freehold lands the said Smith Meggot died seised of, wherein the said plaintiff Bridget Meggot is dowable ; and also to inquire what copyhold or customary lands the said Smith Meggot died seised of, wherein the plaintiff Bridget is entitled to dower or any other estate by the custom of the manor wherein the said copyhold or customary lands or any of them do lie. And that the said Master do assign to the plaintiff Bridget her dower in such freehold lands and tenements, and also her dower or widow's estate in such copyhold or customary lands and tenements. And the said Master is to assign and set out particular lands and tenements for that purpose ; and after the lands and tenements shall be set out and ascertained, it is ordered, that the said defendant do deliver possession (3) to the plaintiff of the lands and tenements that shall be so set out and ascertained for the said dower or widow's estate of the plaintiff Bridget ; and the tenants thereof are to attorn and pay their rents to the said plaintiff Bridget. And it is ordered and decreed, that the said Master do take an account of the rents and profits (4) of the said freehold and copyhold or customary lands and tenements whereof the said Smith Meggot died seised, accrued since the death of the said Smith Meggot, which have been received by the said defendant, or by any other person by his order or for his use. And that one-third part of what shall be coming on the said account of rents and profits of such freehold lands and tenements be paid to the plaintiff Bridget by the said defendant in respect of her dower out of such lands and tenements ; and such part of what shall be coming on the said account of rents and profits of the said copyhold or customary lands and tenements as the plaintiff shall appear to be entitled to in respect of her said dower or other widow's estate in such copyhold or customary lands and

tenements is to be paid to the said plaintiff Bridget by the said defendant. And for the better clearing of the accounts &c. [See Usual Directions, No. II. *ante.*] And it is ordered, that the defendant do pay unto plaintiff Bridget Meggot her costs of this suit to this time, to be taxed by the said Master, of which the said Master is to make a separate report. And his Lordship doth reserve the consideration of the subsequent costs (5) as between the plaintiff Bridget and the said defendant until after &c. [See Usual Directions, No. XVII. *ante.*] *Meggot v. Meggot*, L. C. 15th October, 1742. Reg. Lib. B. 1742. fol. 543. S. C. 2 Dick. 794. Cited 2 Ves. jun. 127. Lord Redesdale, 98. note.

For like decree, see *Equity Draftsman*, 656.

NOTES.

(1) If the legal title is disputed an issue will be directed. See Lord Redesdale, 98. *Mundy v. Mundy*, 2 Ves. jun. 122. Or the bill will be retained, with liberty to the plaintiff to bring a writ of dower. See Lord Redesdale, 98, note. *Darcy v. Blake*, 2 Sch. & Lef. 390.

(2) Sometimes a commission is directed. *Wild v. Wells*, 1 Dick. 3. *Huddlestone v. Huddlestone*, 1 Ch. Rep. 38. And see *Lucas v. Calcraft*, 1 Bro. 134. S. C. 2 Dick. 594. 1 V. & B. 20. note. *Mundy v. Mundy*, 2 Ves. jun. 125. S. C. 4 Bro. 295. and Commission, No. VI. *post.*

But it may also be referred to the Master. *Meggot v. Meggot*, *supra.* *Goodenough v. Goodenough*, 2 Dick. 795. *Tinney v. Tinney*, L. C. 15 Nov. 1743. Reg. Lib. B. 1743. fol. 52. S. C. 3 Atk. 8. 1 Wils. 54.

(3) *Possession.*

Possession will be ordered to be delivered. *Meggot v. Meggot*, *supra.* *Goodenough v. Goodenough*, 2 Dick. 795.

(4) *Arrears.*

At common law there were no damages in dower. But by the statute of Merton damages are given. See *William v. Gwyn*, 2 Saund. by Williams, 45. note.

And in equity a dowress is entitled to an account of rents and profits from the death of her husband. *Meggott v. Meggott*, *supra.* And see *Curtis v. Curtis*, 2 Bro. 632.

And although, at law, her right to damages is lost by the death of the heir, she is entitled in equity to an account of rents and profits, notwithstanding the death of the heir pending the suit. *Curtis v. Curtis*, 2 Bro. 620.

The account will not be limited to the time of filing the bill, or by analogy to the statute of limitations. *Oliver v. Richardson*, 9 Ves. 222.

Interest will not be allowed on arrears of dower. *Lindsay v. Gibbon*, cited 3 Bro. 495. *Wakefield v. Childs*, 1 Fonbl. 23.

(5) *Costs.*

For costs on bills for dower. See *Beames on Costs*, 35.

At law there are no costs on a mere writ of right or assignment of dower. See *Lucas v. Calcraft*, 1 V. & B. 21. note. S. C. 1 Bro. 134. 2 Dick. 594. But in case of deforcement the statute of Merton gives damages, and the statute of Gloucester costs. See *William v. Gwyn*, 2 Saund. by Williams, 45. note.

For the form of the judgment in a writ of dower. See *Ib.* and *Dennis v. Dennis*, *Ib.* 331. *Coke's Entries*, 171, 172. 175, 176. 181.

No. VI.

COMMISSION TO ASSIGN AND SET OUT DOWER.

George, &c. To ——— greeting: Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, any three or two of you, full power and authority, in pursuance of an order of our Court of Chancery, made in a certain cause there depending, wherein A. B. is complainant, and C. D. defendant, bearing date the —— day of —— last, to assign and set out dower for the aforesaid complainant, out of all and singular the lands and tenements, being lately the estate of —— deceased, in the said order mentioned, called —— . And therefore we command you, any three or two of you, that you meet at a certain time and place to be appointed by you for that purpose, in order to come unto, inspect, and view the aforesaid estate, lands, and premises, wheresoever they shall be found to be situate, lying, or being; and according to the best of your skill and judgment, to assign and set out (1) dower for the said complainant, out of the aforesaid farm, lands, and

premises ; and doing in all and singular the premises, according to the true intent and meaning of these presents and the aforesaid order. And when you shall have thus done, that you transmit unto us, in our said Court of Chancery, where-soever it shall be, your certificate concerning the said complainant's dower, ingrossed on parchment, together with your proceedings in the premises as is usual, with this writ. Witness &c. Harr. Pract. vol. ii. p. 21. ed. 1767.

For commission of partition. See Decrees for Partition, &c. No. IV. *ante*.

NOTE.

(1) *Metes and Bounds.*

It seems that the endowment should be by metes and bounds. See *D'Arcy v. Blake*, 2 Sch. & Lefr. 391. Co. Litt. 32 b. Vin. Abr. tit. Dower, (X). And see Decrees for Partition &c. No. IV. *ante*.

No. VII.

DECREE TO CONFIRM JOINTURE.

[*Inter alia*] And the plaintiff Sir Willoughby Aston now offering to confirm the jointure of the defendant Dame Catherine Aston, in the several estates settled upon her in jointure by the deeds, dated &c. or either of them, his Lordship doth order and decree that the plaintiff Sir Willoughby Aston do confirm the jointure of the said defendant Dame Catherine Aston in all the said estates, as Mr. S. one &c. shall direct ; and the said Master is to settle the deeds or assurances for the confirmation of such jointure, in case the parties differ about the same. And after such jointure shall be confirmed in manner aforesaid, it is further ordered, that the defendant Dame Catherine Aston do produce before the said Master upon oath, all deeds and writings in her custody or power relating to the several estates comprised in the settlements, dated &c. or any of them, or any part thereof. And it is further ordered, that the defendant Dame Catherine Aston do also produce before the said Master, upon oath, all deeds and writings in her custody or power relating to the lands, manors, and premises comprised in the settlement made by Elizabeth Grey, dated &c. or any part thereof ; and any of the parties are to be at liberty to inspect the said

deeds and writings, or any of them, and to take copies thereof, or of such parts thereof as they shall think fit, at their own expense. And his Lordship doth reserve the consideration of costs, and all further directions, until after the said deeds and writings shall have been produced. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Aston v. Aston*, L. C. 4th December, 1747. Reg. Lib. A. 1747. fol. 152. See S. C. 3 Atk. 302.

For like decree. See Equity Draftsman, 657.

For decree for jointure. See Equity Draftsman, 658.

NOTE.

Confirming Jointure.

A jointress will not be compelled to produce deeds in her possession, unless her jointure is confirmed. *Aston v. Aston*, *supra*. *Towers v. Davys*, 1 Vern. 479.

But it seems that she must produce her jointure deed. *Aston v. Aston*, *supra*. But see *Petre v. Petre*, 3 Atk. 511.

So where she pleads her jointure deed in bar of discovery of deeds in her possession, the plea must state the date of the deed, and the particular lands comprised in it. *Chamberlain v. Knapp*, 1 Atk. 52. And it seems that the deed must be produced. *Aston v. Aston*, *supra*. *Senhouse v. Earl*, 2 Ves. 450.

An offer by the bill is not sufficient, the jointure must be confirmed by the decree. *Leech v. Trollop*, 2 Ves. 662. But see *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430. in which it appears that the deeds were directed to be produced at the trial; but the jointure was not confirmed till the decree on further directions. See S. C. Belt's Supplement, 28.

If the bill does not contain such an offer she may demur to it. *Lord Redesdale*, 162. But it is more usual to plead, *Ib.* and 225.

On confirming her jointure she will be ordered to deliver up deeds in her possession. See *Ford v. Perring*, 1 Ves. jun. 76. *Pyncent v. Pyncent*, 3 Atk. 571. *Petre v. Petre*, *supra*.

That a jointress cannot have any discovery against the heir, if he submits to confirm the jointure. See *Gilb. For. Rom.* 182.

That detinue of charters may be pleaded in bar of dower. See *Vin. Abr.* title Dower. (L.) (M.) (N.)

DECREES RESPECTING INFANTS.

No. I.

DIRECTION FOR DAY TO SHEW CAUSE (1) AGAINST DECREE.

And this decree is to be binding unto the said defendant Robert Spore the infant, unless he, being served with a subpoena (2) to shew cause against the same, shall within six months (3) after he shall attain his age of twenty-one years shew unto this Court good cause to the contrary. *Denny v. Blowers*, L. C. 12th July, 1745. Reg. Lib. A. 1744. fol. 569.

For decree by default against infant. See *Equity Draftsman*, 664.

NOTES.

(1) *Day to shew Cause.*

Infant Plaintiff.

In *Napier v. Lady Effingham*, 2 P. W. 402. S. C. 3 Bro. P. C. 15., a day was given to an infant plaintiff to shew cause against a decree dismissing his bill. But this was a very particular case, and not to be argued from. *Sheffield v. Duchess of Buckingham*, 1 West, 684. And see *Bennet v. Lee*, 2 Atk. 531. *Gregory v. Molesworth*, 3 Atk. 627. And in general the Court follows the rule of law, where it is held, that an infant is as much bound by a judgment in his own action as if of full age. *Gregory v. Molesworth*, *supra*. And see *Lord Brook v. Lord Hertford*, 2 P. W. 519. And the judgment of Lord Hardwicke in *Tuckfield v. Buller*. Decree for Partition against Infant, No. VII. *post*. Unless in a case of gross laches or fraud. *Gregory v. Molesworth*, *supra*. And see *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 631. Lord Redesdale, 21.

In *Serle v. St. Eloy*, 2 P. W. 387. the Master of the Rolls would not bind an infant by an offer made by her bill, through the mistake of her agents. But in general infants are as much bound as adults by the conduct of their solicitor. *Tillotson v. Hargrave*, 3 Mad. 495.

Infant Defendant.

In *Eyre v. Countess of Shaftesbury*, 2 P. W. 120. it is said that in all decrees against infants, even in the plainest cases, a day must be given them to shew cause when they come of age. And see *Napier v. Lady Effingham*, 2 P. W. 403. *Cary v. Bertie*, 2 Vern. 342. And the omission of it is said to be error in the decree. *Savage v. Carroll*, 1 Ba. & Be. 551. And see *Bennett v. Hamil*, 2 Sch. & Lef. 577. But in *Sheffield v. Duchess of Buckingham*, 1 West, 684. Lord Hardwicke said he took it to be the course of the Court not to give a day, unless a conveyance was directed either in form or substance. And see *Adams v. Gould*, 2 Dick. 443.

So where lands are devised to trustees to be sold for payment of debts, and the heir at law is an infant, he has no day given him to shew cause on his coming of age; otherwise where there is no devise of lands expressly to any particular person, and consequently a conveyance from the infant is necessary. *Blatch v. Wilder*, 1 Atk. 421. S. C. 1 West, 324. And see *Cooke v. Parsons*, Prec. in Ch. 184. S. C. 2 Vern. 429. *Uvedale v. Uvedale*, 3 Atk. 119. *Anon.* 3 P. W. 389. note. And see *Parol Demurring*, No. II. note, *post*.

So where the legal estate is in trustees, and an execution of the trust is to be directed, there is no occasion to give the infant *cestui qui trust*, a day to shew cause. *Thoroton v. Blackbourne*, Harr. 367. note.

(2) The subpoena is a judicial writ and must be returnable in term. *Gilb. For. Rom.* 160.

The infant after coming of age, having gone abroad to avoid his creditors, service of the subpoena upon his clerk in Court was held sufficient. *Elcock v. Glegg*, 2 Dick. 764.

(3) *Enlarging Time.*

After the infant comes of age the Court will enlarge the time for shewing cause against the decree. *Trefusis v. Cotton*, Mos. 203.

Making Decree absolute.

If upon the subpoena to shew cause being served upon the defen-

Decrees respecting Infants.

dant he does not appear, the decree will be made absolute. *Wharam v. Broughton*, 1 Ves. 185. *Gilb. For. Rom.* 160.

After coming of age, and before the decree is made absolute, he may in general obtain leave to put in a new answer. *Pountain v. Caine*, 1 P. W. 504. *Napier v. Lady Effingham*, 2 P. W. 403. *Trefusis v. Cotton*, Mos. 308. And see Cases referred to in *Bennet v. Leigh*, 1 Dick. 89. And may examine witnesses anew. *Napier v. Lady Effingham*, *supra*.

But in some cases he is confined to shewing error in the decree. See Decree for Foreclosure against Infant, No. V. *post*.

And after laches, leave to put in a new answer was refused. *Bennet v. Leigh*, 1 Dick. 89. And see *Cecil v. Lord Salisbury*, 2 Vern. 224.

Under special circumstances he will be allowed to put in a new answer before he comes of age. *Bennet v. Lee*, 2 Atk. 532. 487. *Savage v. Carroll*, 1 Ba. & Be. 548. But after being once permitted to do so, he will be considered as a plaintiff, and as such bound. *Savage v. Carroll*, 2 Ba. and Be. 444.

And in case of fraud he may, during his infancy or afterwards, file an original bill to set aside the decree. *Carew v. Johnston*, 2 Sch. & Lef. 292. And see *Richmond v. Tayleur*, 1 P. W. 737. S. C. 1 Dick. 38. *Sheffield v. Duchess of Buckingham*, 1 West, 685. *Trefusis v. Cotton*, Mos. 308.

No. II.

DIRECTION FOR PAROL TO DEMUR.

And in case the said intestate's personal estate shall not be sufficient to pay his debts, then the plaintiff is to be at liberty to apply to the Court touching the receiving a satisfaction for the same out of the real assets of the said intestate, when the defendants the infants shall come of age. *Farhill v. Hill*, L. C. 4th February, 1746. *Reg. Lib. A.* 1746. fol. 723.

For minutes of like decree. See 2 Newl. Pract. 334.

NOTE.

Parol Demurring.

At law where an infant heir is sued on a specialty of his ancestor, the parol demurs (*i. e.* he may plead that he is an infant, and that

he ought not to answer until he is of age). See Com. Dig. "Enfant." (D.) 3. Pleader, 2 (E.) 3. Chitty on Pleading, vol. ii. p. 520.

And where lands in fee descend to an infant, the parol demurs in equity as well as at law. Chaplin v. Chaplin, 3 P. W. 368. And see Lechmere v. Brasier, 2 J. & W. 290.

Hence where real estate descends to an infant heir, and bond creditors file a bill for satisfaction of their debts, no sale can take place till the heir comes of age. Lechmere v. Brasier, *supra*.

So on a bill to marshal assets against an infant heir, the Court will declare the right, but will not decree a satisfaction out of the real estate, until the infant comes of age. Wilson v. Pollard, Appendix(1). And see what is said by Mr. Hart, in Pott v. Gallini, 1 S. & S. 209.

In Powell v. Robins, 7 Ves. 211., on a bill to marshal assets against an infant devisee, the Master of the Rolls declared the right, but did not direct a sale. But in Plaskett v. Beeby, 4 E. R. 485. it was held, that where an infant devisee is sued under the statute 3 W. & M. c. 14. the parol does not demur.

In Lechmere v. Brasier, *supra*, the Lord Chancellor thought that in the case of the heir of a trader sued under the statute 47 Geo. 3. Sess. 2. c. 74. the parol might demur. But a sale was afterwards directed. See S. C. 1 Russ. 72.

Where lands descend to an infant, subject to a trust for sale, the parol does not demur, and a sale will be directed, with a day to shew cause. Uvedale v. Uvedale, 3 Atk. 117. And see Davison v. Goddard, Gilb. 66. But see Scarth v. Cotton, Ca. Temp. Talb. 198. S. C. Jac. 635. note.

So where lands descend subject to a charge of debts. Hargrave v. Tindal, 1 Bro. 136. note. Or of Legacies. Mould v. Williamson, 2 Cox, 386. Pope v. Gwyn, 2 Dick. 683. And see Decree for Sale against Infant, No. III. *post*. Or to any equitable lien or charge. Brookfield v. Bradley, Jac. 632. And this, although the suit is instituted by other creditors, S. C. But a sale cannot be directed on the ground that it will be for the benefit of the infant. S. C.

Where the heir takes as special occupant the parol does not demur. Chaplin v. Chaplin, 3 P. W. 368.

Whether, where the trust of an estate in fee descends to an infant, the parol demurs. Q. Creed v. Colville, 1 Vern. 173.

Where the parol demurs, the Court will appoint a receiver. Sweet

v. Partridge, 1 Cox, 433. S. C. 1 Dick. 696. Lechmere v. Brasier, *supra*. March v. Bennett, 1 Vern. 428.

APPENDIX (1).

Direction for marshalling Assets where Defendant an Infant.

And in case the said intestate's personal estate shall not be sufficient for that purpose, and the said intestate's specialty creditors shall exhaust any part of his personal estate in satisfaction of their demands, then his Honour doth declare, that the said intestate's simple contract creditors are entitled to come in and receive a satisfaction *pro tanto* out of his real assets. And the parties are to be at liberty to apply to this Court for satisfaction of their demands out of the real estate, when the defendant John Pollard shall attain his age of twenty-one years. Wilson v. Pollard, M. R. 9th November, 1747. Reg. Lib. B. 1747. fol. 42.

No. III.

DECREE FOR SALE AGAINST INFANTS.

His Lordship doth declare the will of the said testator William Weedley, to be well proved &c. [See Decrees respecting Real Assets, No. I. *ante*.] And doth also declare that the defendants the infants, the co-heirs at law of the said testator, are to be considered as trustees for the benefit of the said testator's creditors in respect of the charge for their debts. And doth order that it be referred to Mr. E. one &c. to take an account of what is due to the plaintiffs and the other creditors of the said testator for their debts, and to compute interest &c. and the said Master is likewise to take an account of the said testator's personal estate, which hath been received by the defendant Clarke, his surviving executor, and by the said Tindall deceased, and the defendants Richardson and Appleton, the executors of the said Tindall, or any of them, or by any other person &c. And such personal estate is to be applied in payment of the said testator's debts in a course of administration. And it is further ordered that such part of the personal estate of the said testator as shall upon the said account appear to have come to the hands of the said

Tindall, be answered by the said defendants Richardson and Appleton, his executors &c. [See Decrees respecting Executors and Trustees, No. II. *ante.*] And all the creditors of the said testator are to be at liberty to come in before the said Master and prove their debts. And the said Master is to cause an advertisement &c. [See Decrees respecting Personal Assets, No. I. *ante.*] And in case the said testator's personal estate shall not be sufficient for the payment of his debts, his Lordship doth declare that the residue of the said testator's debts is a charge on his real estate by virtue of his will, and doth order and decree that so much of the said testator's real estate as shall be sufficient for that purpose, be sold (1) with the approbation &c. [See Usual Directions, No. VI. *ante.*] And it is further ordered that the money arising by such sale, be applied in payment of so much of the said testator's debts as his personal estate shall not extend to satisfy, and if there shall be any surplus of the money arising by such sale, his Lordship doth declare that the same will belong to the defendants, the co-heirs at law of the said testator, to be equally divided between them. And in case any of the creditors of the said testator shall exhaust &c. [See Decrees respecting Real Assets, No. IV. *ante.*] And for the better taking the said accounts, [See Usual Directions, No. II. *ante.*] And the defendants, the heirs at law of the said testator, are to join in the conveyance (2) of the said estate to any purchaser or purchasers thereof when they shall attain their respective ages of twenty-one years, unless &c. [See No. I. *ante.*] And in the mean time, it is further ordered that any purchaser or purchasers of the said estate, or any part thereof, do hold and enjoy the same against the said defendants the co-heirs at law of the said testator, till they shall respectively come of age; and that all parties be paid their costs of this suit hitherto, to be taxed by the said Master, out of the said testator's estate. And his Lordship doth reserve (3) the consideration of subsequent costs, till after &c. [See Usual Directions, No. XV. *ante.*] And any of the parties are to be at liberty to apply &c. [See Usual Directions,

No. XIX. *ante.*] And this decree is to be binding upon the said defendant Blanchard, unless &c. [See Decrees by Default, No. I. *post.*] *Hargrave v. Richardson*, L. C. 9th July, 1753. Reg. Lib. A. 1752. fol. 566. S. C. (*Hargrave v. Tyn-dal*), 1 Bro. 136. note.

NOTES.

(1) *Sale against Infant.*

In *Hargrave v. Richardson*, *supra*, a sale was directed at the original hearing. And see *Blatch v. Wilder*, 1 Atk. 420. S. C. 1 West, 324. *Uvedale v. Uvedale*, 3 Atk. 119. *Pope v. Gwyn*, 2 Dick. 683. But in *Birch v. Glover*, 4 Mad. 376. the Vice Chancellor held that if a real estate devised to an infant is rendered liable to the payment of debts on the insufficiency of the personal estate, and it is admitted on the hearing of the cause, that the personal estate is insufficient, a sale cannot be directed until a report is made of such insufficiency; but that liberty will be given to the Master to make a separate report. And see *Mould v. Williamson*, 2 Cox, 386. And see Decrees respecting Real Assets, No. III. note (3), and No. XVI. note (1), *ante*.

(2) *Conveyance by Infant.*

The purchaser cannot have a conveyance until the infant is of age. *Hargrave v. Richardson*, *supra*. And see *Powell v. Powell*, 6 Mad. 53. *Noel v. Weston*, Coop. 139. But in the mean time he will be decreed to hold and enjoy. *Hargrave v. Richardson*, *supra*. *Blatch v. Wilder*, 1 Atk. 421. S. C. 1 West, 324. *Chandler v. Beard*, 1 Dick. 392. *Pope v. Gwyn*, 2 Dick. 683. *Mould v. Williamson*, 2 Cox, 386.

Upon his coming of age, the infant will be ordered to convey. See Order No. IV. *post*.

(3) Further directions are not reserved. See Reservation of Further Directions, No. XV. *ante*.

No. IV.

ORDER FOR INFANT TO CONVEY ON COMING OF AGE.

[Edward Wright Stanhope was a party to the cause.]

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor &c. by Mr. C. of counsel with Edmund Garforth, it was alleged &c. that by

the decree made in these causes the said manor of Grimstone was directed to be sold &c. ; in pursuance whereof William Garforth hath been reported, and stands absolutely confirmed, the best purchaser of the said manor, at the sum of £——; that the said William Garforth afterwards paid his purchase money &c. and all parties executed the conveyance of the said premises, except the said Edward Wright Stanhope; that the said Master by his report, dated the 9th instant (among other things), certified that he conceived that the said Edward Wright Stanhope, being devisee of the said real estate, was a proper party to join in the conveyance of the said estate to the heirs or assigns of the said William Garforth (he being then dead); and that it appeared to him, by the affidavit of &c. that the said Edward Wright Stanhope had then attained his age of twenty-one years; and therefore it was prayed that the said Edward Wright Stanhope might be directed to execute the conveyance &c. Whereupon and upon hearing an affidavit of notice of this motion to the said Edward Wright Stanhope, the said Master's report, and an order dated the 3d day of March, 1744, read, and what was alleged by the counsel for the said Edward Garforth, his Lordship doth order, that the said Edward William Stanhope do join in the conveyance of the said premises to Edward Dring, now Garforth, pursuant to the said report, on his being served with this order. Stanhope v. Stanhope, L. C. 23d July, 1748. Reg. Lib. B. 1747. fol. 401.

No. V.

FORECLOSURE AGAINST INFANT.

The form of the decree is the same with the usual form, [see Decrees respecting Mortgages, No. I. *ante.*] giving the infant a day to shew cause. (See No. I *ante.*)

NOTE.

In *Draper v. Earl of Clarendon*, 2 Vern. 518. it is said, that an infant cannot be foreclosed. But in *Bishop of Winchester v. Beavor*, 3 Ves. 317. the Master of the Rolls observed, that the former

Decrees respecting Infants.

case did not state the rule of the court correctly, for that an infant might be foreclosed.

The infant, however, must have a day to shew cause. *Booth v. Rich*, 1 Vern. 295. *Gordon v. Williamson*, 19 Ves. 114. *Price v. Jones*, M. R. 15th February, 1743. Reg. Lib. B. 1742. fol. 207. And see *Mallack v. Galton*, 3 P. W. 352. *Anon. Mos. 66*. *Bennet v. Edwards*, 2 Vern. 392.

The infant is also entitled to a day to shew cause against the order for making the foreclosure absolute. *Price v. Jones*, M. R. 22d May, 1744. Reg. Lib. B. 1743. fol. 367. *Gordon v. Williamson*, *supra*.

On a bill by a mortgagee against the customary heir of the mortgagor, who was an infant, for a surrender and foreclosure, the Court refused to decree a foreclosure, but directed an account, and in default of payment, that the plaintiff should hold and enjoy, and that the infant should surrender at twenty-one, with a day to shew cause. *Spencer v. Boyes*, 4 Ves. 370.

Shewing Cause.

In *Anon. Mos. 66*. after a decree of foreclosure against an infant, he was allowed, on coming of age, to put in a new answer. But in *Mallack v. Galton*, 3 P. W. 352. it was held, that the infant, on coming of age, is not permitted to open the account, or even to redeem, but is confined to shewing error in the decree. And see *Lyne v. Willis*, *Ib.* note. *Bishop of Winchester v. Beavor*, 3 Ves. 317. *Williamson v. Gordon*, 19 Ves. 116.

No. VI.

DECREE FOR SALE ON BILL BY MORTGAGEE
AGAINST INFANT.

[The bill prayed a sale.]

His Honour doth order and decree, that it be referred to Mr. E. one &c. to take an account of what is due to the plaintiff for principal and interest on his mortgage, and to tax the plaintiff and the defendant their costs of this suit. And, by consent of the plaintiff, it is further ordered and decreed, that the said mortgaged premises be sold &c. [See Usual Directions, No. VI. *ante*.] And out of the money arising by such sale the plaintiff and the defendant are to be paid their

costs of this suit, and then the plaintiff is to be paid what shall be reported due to him for principal and interest on his said mortgage. And if there shall be any residue of the said purchase money, the same is to be laid out &c. [See Usual Directions, No. XI. *ante.*] for the defendant the infant's benefit. And the said Accountant-general is to declare, &c. And the defendant is to be at liberty to apply to this Court for the same when he shall come of age. And for the better taking of the said accounts &c. [See Usual Directions, No. II. *ante.*] And this decree is to be binding upon the defendant, unless &c. [See No. I. *ante.*] *Pace v. Marsden*, M. R. 4th December, 1747. Reg. Lib. B. 1747. fol. 179.

For the like decree, but without costs to defendant, and not stated to be by consent, and sale not prayed. See *Wakeham v. Lome*, M. R. 9th December, 1747. Reg. Lib. B. 1747. fol. 216.

For the like decree, with costs, and not stated to be by consent, and sale not prayed. See *Hamond v. Bradley*, M. R. 13th July 1748. Reg. Lib. A. 1747. fol. 594.

NOTE.

Sale on Bill by Mortgagee against Infant.

In *Goodier v. Ashton*, 18 Ves. 83. on a bill of foreclosure against an infant, the Master of the Rolls refused to refer it to the Master to inquire whether a sale would be for the benefit of the infant. But in *Monday v. Monday*, 1 V. & B. 223. the Lord Chancellor directed such a reference, observing, that if there was no precedent he would make one, but that he was sure that it had been done.

And on a bill by a mortgagee against an infant, a sale has been directed without a reference. *Pace v. Marsden*, *supra.* *Wakeham v. Lome*, *supra.* *Hamond v. Bradley*, *supra.*

No. VII.

PARTITION AGAINST INFANT.

The form of the decree is the same with the usual form, [see Decrees for Partition, No. I. *ante.*] giving the infant a day to shew cause. (See No. I. *ante.*)

NOTE.

A partition will be decreed against an infant, with a day to shew cause against it. Lord Redesdale, 97.

Decrees respecting Infants.

Formerly mutual conveyances were decreed to be executed by the adult parties, and by the infant at twenty-one, unless he should shew cause to the contrary. See original decree in *Tuckfield v. Buller*, 1 Dick. 242. *Davenport v. Oldis*, there cited. Decree for partition, *Equity Draftsman*, 655. But in *Tuckfield v. Buller*, 1 Dick. 241. S. C. Ambl. 197. Lord Hardwicke held these decrees to be incorrect, and, upon a motion for that purpose, ordered that the execution of the conveyances by all parties should be respited till the infant attained twenty-one. And see judgment of Lord Hardwicke in *Tuckfield v. Buller*, Appendix (1).

Nevertheless, in a subsequent case, he adopted the former practice. *Earl of Cardigan v. Montagu*. Decrees for Partition, No. I. *ante*.

But the latter practice was adopted by Lord Thurlow. *Hubble v. Read*, 1 Dick. 243. note.

And it is now settled, that if the infancy of any of the parties, or other circumstances, prevent mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made. See Lord Redesdale, *supra*. And see Decree in *Agar v. Fairfax*, 17 Ves. 545. 554. *Attorney-General v. Hamilton*, 1 Mad. 214.

So, where an infant is plaintiff in a bill for partition, the conveyances will be respited. *Lord Brook v. Lord Hertford*, 2 P. W. 518.

The costs of infants and *femes covert* should be directed to be borne by their shares. See *Agar v. Fairfax*, 17 Ves. 557.

Order on Default.

If no cause is showed or allowed, mutual conveyances will be decreed. Lord Redesdale, 97.

APPENDIX (1).

The Judgment of Lord Hardwicke in Tuckfield v. Buller.

Lord Chancellor:—"If I doubted, I would cause precedents to be searched. There is a difference between partitions at law and in this court. At law the infant has no day to shew cause, as he has in this court. The infant at law is bound; and all parties, upon a partition so made, have a several legal estate in the lands allotted to each of them. But it is otherwise in this court; for the equitable right is only vested in the parties in the lands allotted in severalty; and therefore this Court, to complete such partition, decrees mutual conveyances. If the conveyance was to be made at present, the infant

would have his estate and partition complete, and yet have a legal estate in common with the plaintiffs in their allotment, which might be attended with great hardship to the plaintiffs. It is said, that James Buller the elder is tenant for life and can convey. But that does not clear up the whole objection; for, supposing he should die during the minority of the son, the estate tail would then fall into possession. The case cited of *Lord Brooke v. Lord Hertford*, 2 P. W. 518. is a material case, where the point was disputed, and a more favourable case for ordering mutual conveyances than the present, as the legal estate in the whole was in trustees, who might have conveyed. But there the conveyance was postponed until the plaintiff, the infant, came of age; and yet an infant plaintiff has no day to shew cause against a decree at his suit." [From a MS. of Sir George Hampson.]

No. VIII.

ORDER FOR GUARDIAN AND MAINTENANCE,
ON PETITION. (1)

It is ordered, that it be referred (2) to Mr. S. one &c. to approve (3) of a proper person or persons to be appointed guardian or guardians of the person and estate of the petitioner during her minority. And it is ordered, that all proper parties have notice to attend the said Master thereon, and be at liberty to propose such guardian or guardians. And it is ordered, that the said Master do inquire and state the petitioner's age (4), and the nature and amount of her fortune, and what relations she has, and on what evidence or ground he approves of such person or persons so to be appointed guardian or guardians. And it is ordered, that the said Master do inquire (5) and state what will be proper to be allowed for the maintenance and education of the petitioner during her minority, and from what past period such allowance should commence, and out of what fund it should be taken. And after the said Master shall have made his report, such further order shall be made as shall be just. In Matter of Arnold, M. R. 1st December, 1814. Reg. Lib. A. 1814. fol. 50.

Decrees respecting Infants.

For orders for guardian. See Hand's Pract. 236. 1 Turn. Pract. 385.

For order upon death of guardian. See Hand's Pract. 237.

NOTES.

(1) Order for Guardian on Petition.

The form of a decree for a guardian and maintenance is the same with that of an order on petition.

It seems that the first case to be found of a guardian appointed by the Chancellor on petition, without bill, was in 1696, in the case of Hampden. See Co. Litt. 88. b. note 16.

But it has been frequently done since. See *Mellish v. De Costa*, 2 Atk. 14. S. C. (*Villareal v. Mellish*) 1 West, 299. 2 Swan. 533. note. *Ex parte Birchell*, 3 Atk. 813. *Ex parte Jordan*, 1 Dick. 294. *Ex parte Champney*, 1 Dick. 350. *Ex parte Salter*, 2 Dick. 769. S. C. 3 Bro. 500. *Ex parte Mountfort*, 15 Ves. 445. *Corbet v. Tottenham*, 1 Ba. & Be. 60.

So the right to guardianship may be determined on petition. *Eyre v. Countess of Shaftesbury*, 2 P. & W. 120. *Teynham v. Leonard*, 2 Bro. P. C. 539. *Ex parte Earl of Ilchester*, 7 Ves. 348. But see *Ex parte Hopkins*, 3 P. W. 154.

So where a testamentary guardian declines to act, a guardian may be appointed on petition. *O'Keeffe v. Casey*, 1 Sch. and Lef. 106.

But a testamentary guardian cannot be removed for misconduct without a bill. S. C.

An order may be obtained for delivery of the custody of an infant upon the infant being brought up by *habeas corpus*. In the matter of the children of the Earl of Westmeath, Appendix (1). *Lyons v. Blenkin*, Ib. But see *Ex parte Hopkins*, 3 P. W. 154. note A.

But the better mode of proceeding is by petition. See *Lyons v. Blenkin*, Jac. 254. and case referred to in note.

Order for Maintenance on Petition.

Sir Joseph Jekyl was the first judge who made orders for maintenance on petition, without a bill being filed. See *Ex parte Richards*, 3 Atk. 518. *Ex parte Odel*, and *Ex parte Peploe*, cited 2 Atk. 315.

And the precedent has since been followed. *Ex parte Whitfield*, 2 Atk. 315. *Ex parte Thomas*, Ambl. 146. *Ex parte Kent*, 3 Bro. 88.

Ex parte Salter, 3 Bro. 500. S. C. 2 Dick. 769. *Ex parte Mountfort*, 15 Ves. 445. *Ex parte Myerscough*, 1 J. & W. 151.

And the costs of the petition will be allowed to the guardian in his accounts. *Ex parte Thomas, supra.* *Ex parte Salter, supra.*

But maintenance will not be ordered on petition, except in special cases, as where there is a specific fund for maintenance. *Ex parte Mountfort*, 15 Ves. 448. Or where the property is very small. S. C.

In *Ex parte Mountfort, supra*, it is said that if the property of the infant exceeds 100*l.* a year, a bill must be filed. But in *Ex parte Myerscough, supra*, maintenance was ordered on petition, though the property was stated to be about 200*l.* a year.

Where the infant had not an absolute interest, the Court refused to confirm the Master's report upon a petition, but directed a bill to be filed. *Fairman v. Green*, 10 Ves. 47. But see *Ex parte Kebble*, 11 Ves. 606.

When it is necessary to take accounts in the Master's office, a bill must be filed. *Corbet v. Tottenham*, 1 Ba. & Be. 60.

So where trustees have a discretionary power as to maintenance. S. C.

Where Infant entitled to Real Estate.

Formerly, where an infant was entitled to real estate, an order might be obtained for a guardian and maintenance on petition, although the property was worth 200*l.* a year. In *re Man*, Appendix (2).

But of late, where an infant is entitled to real estate, maintenance will not be allowed without a bill, unless the property is under 100*l.* a year. In *re Molesworth*, M. R. 25th June, 1825. MS. In this case the Master of the Rolls said that he had conferred with the Lord Chancellor on the point.

It seems that formerly, where the infant was entitled to real estate, the appointment of a guardian was thought sufficient without the appointment of a receiver. In *re Man, supra.* In *re Patton*, *Ib.*

And where a receiver was thought necessary, an order for a receiver has been made on petition. *Ex parte Odel*, cited 2 Atk. 315.

But it has since been held that the Court has no jurisdiction to appoint a receiver unless upon a bill filed. *Ex parte Whitfield*, 2 Atk. 315. *Ex parte Mountfort*, 15 Ves. 445. And see *Anon.* 1 Atk. 489. S. C. 1 West, 347.

*Decrees respecting Infants.**(2) Reference as to Guardians.*

Where the property of the infant is very small, a reference as to the guardianship will be dispensed with; as where it consisted of a pension of 15*l.* during minority. *In re Jones*, 1 Russ. 478. And see cases referred to in *Ex parte Wheeler*, 16 Ves. 266.

But the Master of the Rolls refused to make the order without a reference, although the property did not exceed 1500*l.* *Ex parte Wheeler, supra.* And see *Ex parte Janion*, 1 J. & W. 395.

Where the infant is of the age of fourteen, he may choose a guardian, who will be appointed without a reference. *Ex parte Edwards*, 3 Atk. 519. *In re Man*, Appendix (1).

Where a person had been appointed guardian by the will of the father, but declined to act, a reference was directed, with liberty to the person to attend the Master. *In re Patton*, Appendix (2).

In *Elwes v. Const*, 1 Mad. Chan. 334. note. where a father by will named persons as guardians of his illegitimate children, it was held, that a reference was necessary, to see if they were proper persons. But persons so named, have been appointed guardians without a reference. *Peckham v. Peckham*, 2 Cox, 46. *Ward v. St. Paul*, 2 Bro. 583. *Chatteris v. Young*, 1 J. & W. 106.

One of three persons jointly appointed guardians having died, the survivors were appointed without a reference. *Hall v. Jones*, 2 Sim. 41.

That a joint appointment of guardians by the Court does not survive. See *Bradshaw v. Bradshaw*, 1 Russ. 528. Otherwise in the case of testamentary guardians. See *Eyre v. Countess of Shaftesbury*, 2 P. W. 103.

(3) The order is that the Master shall approve, not that he shall appoint, as in the case of a receiver. See *Bowersbank v Colasseau*, 3 Ves. 165.

(4) In all reports of guardians and maintenance of infants mention should be made of the age of the infants, and of the nature and amount of their fortunes, and of the evidence or grounds upon which any particular persons are approved of as guardians. And where guardians are approved of, it should be stated whether such guardians are willing to enter into a recognizance before the Master, duly to account for such part of the infant's fortune as shall come to their hands, as the Court shall direct. See Circular Letter of the

Secretary of the Lord Chancellor to the Masters, of the 6th of August, 1777. 1 Turn. Pract. 397.

(5) Reference as to Maintenance.

Where the property of the infant is very small, a reference will also be dispensed with as to maintenance. *Ex parte Green*, 1 J. & W. 253. *Ex parte Dudley*, *Ib.* 254. note.

Where the property of the infants did not exceed 20*l.* a year each, an order was made for maintenance without a reference. *Kilpatrick v. Kirkpatrick*, M. R. 27th July, 1829. MS.

APPENDIX (1).

Order for Habeas Corpus for Delivery of Children to Father.

[The order was made on petition.]

His Lordship doth order that a writ of Habeas Corpus do issue, returnable immediately, directed to the said Emily Mary Marchioness of Salisbury, and Emily Anne Bennett Elizabeth Countess of Westmeath, to bring before his Lordship the bodies of Lord Delvin and Lady Rosa Nugent, at his Lordship's room at Westminster, on Saturday morning the 19th instant, at 11 o'clock. In the matter of the Children of the Earl of Westmeath, L. C. 16th June, 1819. Reg. Lib. A. 1818. fol. 1359.

Order on Habeas Corpus for Delivery of Children to Father.

His Lordship doth order that the bodies of the said Lord Delvin and Lady Rosa Nugent, the children of the said Earl of Westmeath, be delivered to him. In matter of Children of Earl of Westmeath, L. C. 23d June, 1819. Reg. Lib. A. 1818. fol. 1534. S. C. Jac. 251. note.

Order for Habeas Corpus for bringing up Children on application of Father.

[The order was made on motion.]

His Lordship doth order that a writ of Habeas Corpus do issue, directing the said defendants George Blenkin and Mary his wife to bring into this Court the plaintiffs Mary Lyons, Frances Lyons and Jane Beatson Lyons the infant children of the said John Lyons, at the sitting of this Court, at Westminster Hall, on the 10th of February next. *Lyons v. Blenkin*, L. C. 15th January, 1820. Reg. Lib. B. 1819. fol. 208. S. C. Jac. 247.

*Decrees respecting Infants.**Writ of Habeas Corpus in the above case.*

George the Third &c.—To George Blenkin and Mary his wife, greeting. We command you, that you do on Thursday, the 15th day of February next, bring before us in our Court of Chancery, at the sitting thereof at Westminster Hall, the bodies of Mary Lyons, Frances Lyons, and Jane Beatson Lyons, or by whatsoever name or addition they are known or called, who are detained in your custody, to perform and abide such order as our said Court shall make in their behalf. And hereof fail not, and bring this writ with you. Witness ourself, at Westminster, the 29th day of January, in the 60th year of our reign. [From a MS. of Mr. Jacob.]

The Return to the above Writ.

The within named George Blenkin and Mary his wife do hereby certify to the Right Honourable the Lord High Chancellor of Great Britain, that the within-named plaintiffs Mary Lyons, Frances Lyons, and Jane Beatson Lyons, are detained by and are under the protection of the said Mary Blenkin, in the parish of Sculcoates in the county of York, for the purpose of their being educated and maintained by her as their guardian, under the will of their grand-mother Mary Beatson deceased, and according to the trusts and directions for those purposes contained in the said will. Dated the 9th of February, 1820. (From a MS. of Mr. Jacob.) *S. C. Lyons v. Blenkin, supra.*

APPENDIX (2).

Order appointing Guardian in the nature of Receiver.

Whereas the said John Man, on the 9th day of October last, preferred his petition to the Right Honourable the Lord High Chancellor, setting forth that the petitioner is entitled, by virtue of the settlement made on the marriage of the petitioner's late father and mother, to a real estate of about the clear yearly value of 200*l.*; that the petitioner's father and mother are both dead, without appointing any person guardian to the petitioner; and the petitioner being now about the age of nineteen years, is not, in law, capable to manage the said estate, and is desirous that W. B., of Lincoln's Inn, Esq. should be appointed guardian to the petitioner; and forasmuch as &c. It was prayed that &c. Whereupon all parties concerned were ordered to attend &c. And counsel for the petitioner this day attending accordingly, upon hearing the said

petition read, and what was alleged by the petitioner's counsel, and the said petitioner John Man being of the age of nineteen years and upwards, and in court desiring that the said W. B. may be assigned his guardian, his Lordship doth order that the said W. B. Esq. be appointed guardian to the said petitioner J. M. the infant, and that it be referred to Mr. A. one &c. to consider of a proper maintenance for the said petitioner J. M. the infant, as well for the time past as to come, and state the same to the Court; whereupon such further order shall be made relating thereto as shall be just. And that what shall be allowed for the past maintenance of the said petitioner J. M. the infant, be paid to the person or persons that have maintained him; and what shall be allowed for the time to come be paid to the person who shall maintain him. On the behalf of John Man, an infant, L. C. 4th November, 1747. Reg. Lib. B. 1747. fol. 5.

The like Order.

[Mr. Drummond was appointed guardian to the petitioner by the father's will, but declined to act.]

Upon consideration this day had by the Right Honourable the Master &c. of the humble petition of the said William Patton, shewing that E. N. deceased by her will dated the 7th of May, 1736, devised to the petitioner, his heirs and assigns, some freehold chambers in Lincoln's Inn New Square, in the county of Middlesex, and that David Patton, Esq. the petitioner's father, died some time since, having made his will, dated the 25th of June, 1743, and thereof appointed the petitioner's sister, Dorothea Patton, sole executrix; and did thereby &c. That the petitioner's said sister, some time since, on behalf of the petitioner, caused the said chambers so devised to him to be repaired, and afterwards let the same; but for want of a person properly authorised to take care of the petitioner's estate and interest in the said chambers, and to receive the rents and profits thereof for the petitioner's use, the tenants refuse to pay their rent, and thereby the petitioner will be greatly prejudiced, unless some person be speedily authorised to receive the same. It is ordered, that it be referred to Mr. S. one &c. to approve of a proper person to be guardian to the petitioner; and the said Mr. Drummond, and all other parties concerned, are to have notice to attend the said Master, and to be at liberty to propose a guardian, or guardians, for the said petitioner; and after the said Master shall have

made his report, such further order shall be made as shall be just. On the behalf of William Patton, an infant, M. R. 12th July, 1748. Reg. Lib. B. 1747. fol. 392.

No. IX.

ORDER CONFIRMING REPORT OF GUARDIAN.

His Honour doth order, that the said report be confirmed, and that the said Dorothea Patton, the petitioner's sister, be appointed guardian to the petitioner William Patton, to take care of and manage the petitioner's person and estate. In matter of Patton, M. R. 5th August, 1748. Reg. Lib. B. 1747. fol. 412.

For order for confirming report of guardian. See Hand's Pract. 187. Do. of Maintenance. Ib. 189.

NOTE.

Order confirming Report.

In *Cavendish v. Mercer*, 5 Ves. 195. note, the Master's report as to maintenance was confirmed on motion. See *Greenwell v. Greenwell*, 5 Ves. 199. But the practice of confirming these reports on motion is irregular. *Greenwell v. Greenwell*, *supra*. And consequently exceptions do not lie to them. *Ex parte Nicholls*, 1 Bro. 577. *Whittaker v. Marlow*, 1 Cox, 285. *Price v. Shaw*, 2 Dick. 732. Otherwise with respect to receivers. See *Decrees respecting Receivers*, No. I. Note (7), *post*. The report is brought before the Court upon petition, when the Court will confirm or vary it. *Price v. Shaw*, *supra*. And see *Whittaker v. Marlar*, *supra*.

The order contains no restriction as to marriage. In matter of Patton, *supra*. See *Eyre v. Countess of Shaftesbury*, 2 P. W. 113. But see *Recognizance*, *post*.

Recognizance.

The guardian must enter into a recognizance, duly to account for the infant's property. See 1 Turn. Pract. 388. 397.

The recognizance must be with two sureties. Dr. Davis's case, 1 P. W. 698.

It must also be conditional, that he shall not permit or suffer the infant to marry without the consent of the Court. S. C. *Eyre v. Countess of Shaftesbury*, 2 P. W. 112.

But under special circumstances the form may be altered, as that

the infant shall not be married without leave of the Court by the consent, privity, or connivance of the guardian. S. Cs.

No. X.

**DIRECTION FOR REFERENCE WHETHER FATHER
OF ABILITY. (1)**

His Honour doth think fit &c. that it be referred to Mr. A. one &c. to see what is fit and proper to be allowed for the maintenance and education of the defendants the infants for the time past (2) and to come, and whether the plaintiff William Bailey the father is of sufficient ability to maintain the said defendants the infants or not, and state the same to the Court, and thereupon such further order shall be made relating thereto as shall be just. *Bailey v. Arscot*, M. R. 20th May, 1747. Reg. Lib. A. 1746. fol. 378.

NOTES.

(1) *Ability of Father.*

Generally, maintenance will not be allowed out of the property of infants during the life of the father, where he is of ability to maintain them. See *Fawkner v. Watts*, 1 Atk. 408. *Jackson v. Jackson*, 1 Atk. 514. *Butler v. Butler*, 3 Atk. 60. *Darley v. Darley*, 3 Atk. 399. And this rule has been held to apply notwithstanding the gift to the infants has contained an express provision for maintenance. *Hughes v. Hughes*, 1 Bro. 387. And see *Andrews v. Partington*, 3 Bro. 60. S. C. 2 Cox, 223. *Mundy v. E. Howe*, 4 Bro. 224. Unless amounting to an express gift to the father. *Hughes v. Hughes*, 1 Bro. 388. *Andrews v. Partington*, *supra*. But the contrary has been since held. *Hoste v. Pratt*, 3 Ves. 733.

The ability of the father is to be estimated not merely with reference to his own circumstances but to the state of his family and the expectations of the infants. See *Buckworth v. Buckworth*, 1 Cox, 80. And on this principle maintenance has been allowed where the father had 6000*l.* a year. *Jervoise v. Silk*, Coop. 52.

The father not being of ability, maintenance will be allowed, although there is no express provision in the gift to the children for that purpose. See *Erratt v. Barlow*, 14 Ves. 202. *Cavendish v. Mercer*, 5 Ves. 195. note. *Fendall v. Nash*, 5 Ves. 197. note.

The father having become bankrupt, maintenance was ordered

Decrees respecting Infants.

without a reference as to his ability. *Kilpatrick v. Kirkpatrick*, Rolls, 27th July, 1829. MS.

Ability of Mother.

In *Hughes v. Hughes*, 1 Bro. 388. the Lord Chancellor said, that it was the practice to refer it to the Master to inquire whether the parents were of ability (not confining it to the father.)

But in *Haley v. Bannister*, 4 Mad. 275. it was held, that if the father was not of ability, maintenance would be allowed, without reference to the ability of the mother, who had a separate estate. And see *Cavendish v. Mercer*, 5 Ves. 195. note.

In *Fawkner v. Watts*, 1 Atk. 408. Lord Hardwicke seems to have thought, that where the father was dead, maintenance would not be ordered, without reference to the ability of the mother. And see what is said by Ashhurst, in *Billingsly v. Critchet*, 1 Bro. 268.

But where the father is dead, it seems that maintenance will be allowed without reference to the ability of the mother. *Lanoy v. Duchess of Athol*, 2 Atk. 447. *Ex parte Lord Petre*, 7 Ves. 403.

Where the mother was insolvent, part of the maintenance was directed to be paid to her. *Heysham v. Heysham*, 1 Cox, 179.

Where the mother has married a second time, maintenance will be allowed. *Billingsly v. Critchet*, *supra*. And see *Tubb v. Harrison*, 4 T. R. 118. *Greenwell v. Greenwell*, 5 Ves. 194.

(2) Maintenance for time past.

It was formerly held, that although the father was not of ability to maintain his children, maintenance could not be allowed for the time past. *Hughes v. Hughes*, 1 Bro. 387. *Hill v. Chapman*, 2 Bro. 231. *Andrews v. Partington*, 3 Bro. 60. S. C. 2 Cox, 223. But the practice has since been altered in this respect, and maintenance will be allowed to a parent, if not of ability for the time past, as well as to come. *Sherwood v. Smith*, 6 Ves. 454. *Reeves v. Brymer*, 6 Ves. 60. And see *Sisson v. Shaw*, 9 Ves. 288. *Maberly v. Turton*, 14 Ves. 500.

An allowance for past maintenance cannot be deducted from the legacy to a child by a father. *Jeffreys v. Jeffreys*, 3 Atk. 123.

Nor from a debt due to a child from a father, except in favour of creditors. *Bank of England v. Morris*, cited *Ib*.

A reference with a view to an increased allowance for maintenance for the time past has been made under special circumstances. *Rainsford v. Freeman*, 1 Cox, 417.

Special Directions.

A liberal allowance will be made for the maintenance of an infant with a view to the circumstances of his family. See *Pierpoint v. Lord Cheney*, 1 P. W. 493. *Harvey v. Harvey*, 2 P. W. 22. *Lanoy v. Duke of Athol*, 2 Atk. 447. *Petre v. Petre*, 3 Atk. 511. *Roach v. Garvan*, 1 Ves. 160. *Hill v. Chapman*, 2 Bro. 231. *Heysham v. Heysham*, 1 Cox, 179. *Exp. Lord Petre*, 7 Ves. 403. *Tweddell v. Tweddell*, Turn. 13. Even in favour of an illegitimate child. *Bradshaw v. Bradshaw*, 1 J. & W. 647. In *Burnet v. Burnet*, 2 Dick. 602. S. C. 1 Bro. 179. a special direction for this purpose was refused. But see *Hoste v. Pratt*, 3 Ves. 733. *Mundy v. Earl Howe*, 4 Bro. 227.

No. XI.

REFERENCE FOR MARRIAGE OF WARD.

Whereas the said defendants John Middlemarsh and Thomas Dawson did, on the 27th instant, prefer their petition unto the Right Honourable the Master, &c. shewing, among other things, that &c.; and therefore it was prayed that &c. Whereupon the parties concerned were ordered to attend his Honour on the matter of the said petition. And counsel for the defendants the petitioners, the defendant Hester Williams, and the plaintiffs this day attending accordingly. Upon hearing the said petition read, and what was alleged by the counsel for the said parties, his Honour doth order that it be referred to the said Master to see whether the match proposed for the defendant Hester Williams, the infant, be a fitting match for her or not. And the said John Le Keux is to lay proposals before the said Master, of what settlement he intends to make on the said defendant Hester. And the said Master is to state the same, with his opinion thereon to the Court. And after the said Master shall have made his report, such further order shall be made relating thereto as shall be just. *Lawrence v. Middlemarsh*, M. R. 31st October, 1746. Reg. Lib. B. 1746. fol. 2.

For like order. See 2 Turn. Pract. 427.

No. XII.

ORDER ON CONFIRMING REPORT.

[*Inter alia*] His Lordship doth order that the said Master's report stand confirmed, and that the articles be entered into in order to the carrying the said proposals into execution as far as the nature and circumstances of the case will admit, with the approbation of the said Master. And it is further ordered, that the plaintiff be at liberty to marry the said Katherine Archer on the footing of the said proposals. *Earl of Plymouth v. Lewis*, L. C. 24th April, 1750. Reg. Lib. A. 1749. fol. 256. S. C. 2 Dick. 801.

No. XIII.

ORDER FOR LIBERTY TO TAKE INFANTS ABROAD.

His Lordship doth order that the petitioner, as the father of the said infants, plaintiffs, be at liberty to remove the said infants, plaintiffs, with him to America aforesaid, or to such other parts and places beyond the seas, and out of the jurisdiction of this Court, in which he shall in the execution of his duty be ordered or find it necessary to reside, there to remain with the petitioner in case the petitioner shall so think fit; the petitioner by his said petition, undertaking to bring the said infants, plaintiffs or such of them as shall then be living, back with him, on his return to this country on the fulfilment of his mission in the petition mentioned, unless the petitioner shall in the mean time, from any unforeseen circumstance, deem it advisable to send them, or any of them back to this country. But the petitioner is half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the said infants actually adopted and in practice at the time of such half-yearly return, and specifying particularly where and with whom they reside. *Jackson v. Hankey*, L. C. 15th May, 1823. Reg. Lib. A. 1822. fol. 1088. S. C. Jac. 265. note.

NOTE.

See *Mountstuart v. Mountstuart*, 6 Ves. 363.

DECREES AND ORDERS RESPECTING INJUNCTIONS.

No. I.

ORDER FOR INJUNCTION ON A DEDIMUS.

Forasmuch as this Court was this present day informed by Mr. K. being of the plaintiff's counsel, that the defendant, being served with process to appear to and answer the plaintiff's bill, hath appeared accordingly, but for delay hath craved a commission to answer in the country, and yet in the mean time prosecutes the plaintiff at law for for the matters in the plaintiff's bill complained of. It is thereupon ordered, that an injunction be awarded for stay of the said defendant's proceedings at law against the plaintiff, for and touching any of the matters here in question, until the said defendant shall perfectly answer the plaintiff's bill (1), and this Court take order to the contrary; but the said defendant is in the mean time at liberty to call for a plea and proceed to trial thereon, and for want of a plea to enter up judgment; but execution is hereby stayed. (2) *Smith v. Sherlock*, M. R. 4th Nov. 1746. Reg. Lib. B. 1746. fol. 30.

For like order. See Harr. 553. Hand's Pract. 10.

For order for injunction on an attachment. See Harr. 554. Hand's Pract. 11. Equity Draftsman, 586.

For writ of injunction to stay proceedings at law. See Harr. 555.

For like writ in the Exchequer. See 1 Fowl. 248.

For docquet for an injunction on a dedimus. See Harr. 553.

For docquet for an injunction on an attachment. See Harr. 555.

For writ of injunction in the Exchequer to stay proceedings in Chancery. See 1 Fowl. 308.

Decrees &c. respecting Injunctions.

For writ of injunction in the Exchequer to restrain proceedings in Spiritual Court. See 1 Fowl. 313.

For writ of injunction in the Exchequer to restrain proceedings in the Admiralty Court. See 1 Fowl. 315.

NOTES.

(1) The form of the common injunction is till answer and further order. See *Vipan v. Mortlock*, 2 Mer. 479.

So in the Exchequer. See 1 Fowl. 249.

Otherwise in the case of special injunction. See *Injunction to stay Waste*, No. XIV. Note (2), *post*.

(2) *Effect of the Common Injunction in Chancery.*

In *Sidney v. Hetherington*, 3 P. W. 146. note. the Lord Chancellor thought that by the terms of the writ, had there not been some resolutions to the contrary, the delivery of a declaration was not a breach of the injunction.

But in *Mills v. Cobby*, 1 Mer. 4. it is said by the Lord Chancellor that it is clearly settled, and not now to be questioned on the ground of any apparent inconsistency in the form, that in the case where proceedings at law are not yet commenced, the injunction prevents the delivery of the declaration. And see *Earnshaw v. Thornhill*, 18 Ves. 488. *Bullen v. Ovey*, 16 Ves. 144. *Garlick v. Pearson*, 10 Ves. 452. *Franco v. Franco*, 2 Cox, 421.

So where the injunction is obtained after outlawry, and consequently before declaration, the plaintiff at law cannot compel proclamations. *Marsack v. Bailey*, 2 S. & S. 577.

By the terms of the writ, the liberty to proceed seems to be confined to signing interlocutory judgment for want of a plea. *Smith v. Sherlock*, *supra*.

But where an action has been commenced, the plaintiff at law may, notwithstanding the terms of the injunction, proceed to final judgment, either upon verdict, or upon plea overruled, and execution only is stayed. See *Morrice v. Hankey*, 3 P. W. 146. *Sidney v. Hetherington*, *supra*. *Franco v. Franco*, *supra*. *Garlick v. Pearson*, *supra*. *Earnshaw v. Thornhill*, *supra*.

Leave will be given to proceed at law to affirm judgment, notwithstanding injunction. See Order for that purpose. *Hand's Pract.* 13. *Equity Draftsman*, 606.

So after an injunction to restrain proceedings upon an award made a rule of a court of law, the defendant may obtain a rule for an attach-

ment for non-performance of the award, provided he does not execute the attachment. *Franco v. Franco*, 2 Cox, 420.

But he cannot proceed against the sheriff. See *Bullen v. Ovey*, 16 Ves. 141. *Bolt v. Stanway*, 2 Anstr. 556. Nor against the bail. *Stone v. Tuffin*, Ambl. 32. *Leonard v. Attwell*, 17 Ves. 385. *Chaplin v. Cooper*, 1 V. & B. 19.

Although he may against a co-obligor, if not a party to the suit. *Chaplin v. Cooper*, 1 V. & B. 16.

The common injunction may be extended to stay trial. See *Order to stay Trial*, No. II. *post*.

Injunction after Execution.

Where the injunction is not obtained until after execution, the form is the same. See *Hawkshaw v. Parkins*, 2 Swan. 549.

In that case the plaintiff at law cannot rule the sheriff to pay the money levied. *Axe v. Clarke*, 2 Dick. 549. *Franklyn v. Thomas*, 3 Mer. 234. And see *Bolt v. Stanway*, 2 Anstr. 556.

In *Axe v. Clarke*, *supra*, the Lord Chancellor said that it would have been different, had the sheriff paid the money voluntarily.

But in *Franklyn v. Thomas*, *supra*, the Lord Chancellor thought that in such a case the person receiving the money would be ordered to pay it into court. And in *Hawkshaw v. Parkins*, 2 Swan. 548. the Lord Chancellor said that subsequently to the case of *Axe v. Clarke*, the Court resolved, that if the money was paid over voluntarily, it would compel a return.

Nor can the plaintiff at law sue out an attachment for costs. *Partington v. Booth*, 3 Mer. 148.

Where in consequence of a demurrer having been put in by the defendant, which was afterwards overruled, the injunction was not obtained till after execution executed, the plaintiff was discharged on terms so as to prevent his setting up the execution as a discharge of the debt. *Franklyn v. Thomas*, 3 Mer. 225. And see the order, *Ib.* 236. As to the effect of such discharge. See *Taylor v. Waters*, 5 M & S. 103.

In the like case, the defendant at law having been discharged by the court of law upon payment of the money into that court, the defendants in equity were permitted, notwithstanding the injunction, to apply for payment of the money into the Court of Chancery. *Hawkshaw v. Parkins*, 2 Swan. 539.

For writ of injunction in the
in Spiritual Court. See 1 *in Exchequer.*

For writ of injunction in the Exchequer stays all proceed-
in the Admiralty Court *and Nelthorpe v. Law, 13 Ves. 324.*

has the same effect, except in the issuable
and execution only are stayed, and the
(1) The for *to trial. See 1 Fowl. 260.*

order. S *question whether the cause is a country cause or a*
So it *depends upon the residence of the defendant. 1 Fowl.*

O *st:*
the defendant resides partly in London and partly in the
it depends upon the place where the subject matter of the
1 Fowl. 260.

where the venue in the action is laid in London or Middlesex,
it is a town cause. 1 Fowl. 250. 261.

In some cases the Court will stay the trial in the first instance.
See *Hill v. Price, 1 Fowl. 260. Bruce v. Le Mesurier, 1 Fowl. 298.*
Rix v. Zang, cited 16 Ves. 221.

For writ of injunction to stay trial. See 1 Fowl. 298.

After an injunction in the Exchequer, the defendant cannot obtain
an order in Chancery for a commission to examine witnesses abroad.
Novaes v. Dorrien, 4 Mad. 362.

But in some cases, leave may be obtained to proceed at law, not-
withstanding the injunction. See 1 Fowl. 329. *Eden on Injunctions,*
76. *Brooks v. Bourne, 1 Price, 72. Houlditch v. Nias, 8 Price. 689.*

No. II.

ORDER EXTENDING COMMON INJUNCTION TO STAY TRIAL. (1)

Whereas by an order bearing date the 21st day of Fe-
bruary 1815, it was ordered that an injunction should be
awarded to stay the defendant's proceedings at law, for and
touching any of the matters there in question, until &c. Upon
opening of the matter this present day unto this Court, by
Mr. M. of counsel for the plaintiff, it was alleged that it ap-
pears by the affidavit of the plaintiff (2) that if the defendant
shall answer all the matters in the plaintiff's bill contained,

answer will contain matter very material to the
upon the trial of the action at law, and that the
cannot safely proceed to a trial of the said action
without a discovery of the matters or things in the said bill
mentioned, and which discovery the plaintiff expects the said
answer, when put in, will contain. It was therefore prayed
that &c. Whereupon and upon hearing the said affidavit of the
plaintiff R. C. and Mr. T. of counsel for the defendants, this
Court doth order that the injunction issued in this cause do
extend (3) to stay trial. *Crokelt v. Bishton*, V. C. 10th March,
1815. Reg. Lib. A. 1814. fol. 389.

NOTES.

(1) *Injunction to stay Trial.*

After the common injunction has been obtained, it may be extended to stay trial until answer or further order. *Crokelt v. Bishton*, *supra*. Harr. 546.

But the common injunction must first be obtained. *Wright v. Brains*, 2 Cox, 232. S. C. 3 Bro. 87. *Garlick v. Pearson*, 10 Ves. 450. *Taylor v. Leigh*, 2 J. & W. 389.

Otherwise where the plaintiff had been prevented from obtaining the common injunction by a demurrer, the arguing of which had been postponed by the defendants. *Raphael v. Birdwood*, 3 Mer. 229, note.

The order will not be made where the application has been delayed until the eve of the trial. *Blacoe v. Wilkinson*, 13 Ves. 454. *Field v. Beaumont*, 3 Mad. 102. S. C. 1 Swan. 204. And see *Taylor v. Leigh*, 2 J. & W. 388.

The order will be made notwithstanding the answer has come in, if there is no certificate of it. *Nelthorpe v. Law*, 13 Ves. 324.

A certificate of the answer being filed is a sufficient objection to the motion, but exceptions having been taken to the answer, and submitted to, the order was made. *Bishton v. Birch*, 1 V. & B. 366.

The order will be made notwithstanding that, according to the rules of the Court, the answer would come in before the trial could take place. *Taylor v. Leigh*, 2 J. & W. 388.

Decrees &c. respecting Injunctions.

After the answer has come in, a motion may be made upon the merits for an injunction, and that it may be extended to stay trial. See *Nicol v. Verelst*, 7 Bro. P. C. 245. *Garlick v. Pearson*, 10 Ves. 451.

(2) Affidavit.

Formerly the order was made upon a general affidavit that the party was advised, and believed that he could not safely proceed to trial until the defendant had answered. *Hartly v. Hobson*, 2 Dick. 728. S. C. 2 Cox, 117. *Farrar v. Lewis*, 2 Dick. 729. S. C. cited 2 Bro. 639. And see *Jones v. —*, 8 Ves. 46. *Nelthorpe v. Law*, 13 Ves. 323. *Partington v. Hobson*, 16 Ves. 220. Unless where the defendant was abroad. *Revet v. Braham*, 2 Bro. 639.

But the practice has since been altered, and the affidavit must now go further, and state that the plaintiff believes that the answer will furnish discovery material to his defence in the action. *Appleyard v. Seton*, 16 Ves. 223. And see *Earnshaw v. Thornhill*, 18 Ves. 488. *White v. Steinwacks*, 19 Ves. 84. *Bishton v. Birch*, 2 V. & B. 41. *Taylor v. Leigh*, 2 J. & W. 389.

This affidavit cannot be answered. *Jones v. —*, *supra*. The Court never examines how far it is well founded, except to this extent, that if the defendant alleges that the plaintiff has by his bill stated a case which by admitting the whole to be true, would not introduce evidence or a discovery that could possibly be material at the trial, the injunction as it could be of no use to the plaintiff, would not be granted. See *White v. Steinwacks*, *supra*.

As to the difference of the practice of the King's Bench and Common Pleas, as to the affidavit required by them to put off trial. See *Partington v. Hobson*, 16 Ves. 222. *Tidd's Pract.* 816. 817.

Effect of the Injunction to stay Trial.

Notice of trial, though accompanied with notice that it was to be considered as nugatory, unless the injunction should be dissolved previous to the day of trial, is a breach of the injunction to stay trial. *Bird v. Brancker*, 2 S. & S. 186.

(3) The language of the order is, that the injunction already granted shall be extended. *Crokelt v. Bishton*, *supra*. *Bishton v. Birch*, 2 V. & B. 40.

And on this ground it is held, that it cannot be dissolved separately. *Bishton v. Birch*, *supra*. And see *Earnshaw v. Thornhill*,

18 Ves. 485. *Naylor v. Middleton*, 2 Mad. 131. But see *Royal Exchange v. Barker*, 1 V. & B. 367. note.

In *Naylor v. Middleton*, *supra*, the Vice-Chancellor seems to have thought that an order *nisi* for dissolving the injunction, although extended to stay trial, might be obtained by one of the defendants upon the coming in of his answer. But in *White v. Steinwacks*, 19 Ves. 83. the Lord Chancellor held that the injunction, when extended to stay trial, could not be discharged on the coming in of the answer of one of the defendants.

After the answers have come in, the injunction to stay trial may be dissolved separately, on cause shown on the merits. *Barrett v. Tickell*, Jac. 154.

No. III.

ORDER NISI TO DISSOLVE INJUNCTION.

Whereas the plaintiff obtained an injunction for staying of the defendant's proceedings at law, till answer and other order to the contrary. Now, upon motion this day made unto this Court by Mr. J. being of counsel for the defendant G. it was alleged, that the defendant hath since put in a full and perfect answer to the plaintiff's bill, and thereby denied the whole equity thereof. And therefore it was prayed, that the said injunction may be dissolved; which is ordered accordingly, unless the plaintiff his clerk in court, having notice hereof, shall on Thursday, the 19th day of this instant November, shew unto this Court good cause to the contrary. *Southcote v. Goldsworthy*, M. R. 12th November, 1747. Reg. Lib. B. 1747. fol. 60.

For like order. See Harr. 516. Hand's Pract. 45. Equity Draftsman, 587.

No. IV.

ORDER CONTINUING INJUNCTION, ON EXCEPTIONS.

Whereas by an order of the 23d day of October last, for the reasons therein contained, it is ordered, that the injunction &c. should be dissolved, unless &c. Now, upon motion this day made unto this Court by Mr. H. being of the plaintiff's counsel, who came to shew cause against the said order, in the presence of Mr. P. of counsel for the defendant T. it was alleged, that the said defendant T. having put in an insufficient answer to the plaintiff's bill, the plaintiff hath taken exceptions thereto, since which the said defendant hath not thought fit to put in any other answer, although the said defendant's answer is very insufficient, as plaintiff is advised. And therefore it was prayed that &c. Whereupon and upon hearing Mr. P. of counsel for the defendant, and of what was alleged by the counsel on both sides, it is ordered that it be referred to Mr. E. one &c. to look into the plaintiff's bill and the defendant's answer, and the plaintiff's exceptions taken thereto, and certify whether the said defendant's answer be sufficient in the points excepted unto or not; but the plaintiff is to procure the said Master's report in four days (1), or in default thereof the said injunction is to stand dissolved without further motion, which in the mean time is hereby continued. *Wheeler v. Trent*, M. R. 12th November, 1747. Reg. Lib. B. 1747. fol. 6.

For like order. See Hand's Pract. 48. Equity Draftsman, 592.

NOTE.

(1) If the report is not procured within the four days the injunction is dissolved; but if the plaintiff procures a report against the answer, after the expiration of the four days, it is a motion of course to revive the injunction. *Philips v. Johnson*, 1 Dick. 292.

No. V.

**ORDER TO ENLARGE TIME FOR SHEWING
CAUSE AGAINST DISSOLVING INJUNCTION.**

Whereas by an order of the 19th day of this instant, November for the reasons therein mentioned, it was ordered that the injunction &c. should be dissolved, unless &c. Now, upon motion this day made unto this Court by Mr. C. being of the plaintiff's counsel, it was alleged that the plaintiff is not prepared to shew cause against the said order. And therefore it was prayed that the time for the plaintiff's shewing cause against the said order may be enlarged to the first General Seal after this term, which is ordered accordingly; but the plaintiff is then to shew cause on the merits. *Pearson v. Dennis*, L. C. 28th November, 1747. fol. 17.

For like order. See Hand's Pract. 46.

No. VI.

**ORDER CONTINUING INJUNCTION TILL HEARING,
THE PLAINTIFF GIVING JUDGMENT &c.**

Whereas by an order of the 27th day of May last, it was ordered that the injunction &c. should be dissolved, unless &c. Now upon opening the matter this present day unto the Right Honourable the Lord High Chancellor by Mr. Attorney-General, and Mr. P. being of the plaintiff's counsel, who came to shew cause against the said order, and moved, and offered divers reasons for the discharge thereof, and for continuing the said injunction, in the presence of Mr. J. of counsel for the defendants Todd and his wife. Whereupon and upon hearing of what was alleged by the counsel for the said parties, his Lordship doth order upon the plaintiff's giving unto the defendants judgment in the ejectment (1) already brought at law, in a fortnight, with a release of errors, (2) and consenting to bring no writ of error, that the said injunction be continued till the hearing of this cause, which the plaintiff is to speed; (3) but in default of the plaintiff's giving

such judgment with a release of errors as aforesaid, by the time aforesaid, it is further ordered that the said injunction be dissolved without further motion. *Otway v. Todd*, L. C. 10th June, 1748. Reg. Lib. B. 1747. fol. 374.

For like order (*semble* after judgment obtained by defendant). See Hand's Pract. 48.

For writ of injunction to stay execution till hearing. See Harr. 557.

For writ of injunction in the Exchequer, to stay proceedings till hearing. See 1 Fowl. 264.

NOTES.

(1) As to the terms usually imposed upon the plaintiff for continuing the injunction. See Gilb. For. Rom. 196.

(2) The release of errors extends to error in the award of execution on a *scire facias* to revive the judgment. *Marquis of Powis v. ———*, 3 Atk. 297.

(3) A clause is generally added to the order that the plaintiff shall speed the cause. Gilb. For. Rom. 196.

No. VII.

ORDER TO DISSOLVE INJUNCTION MADE ABSOLUTE, NO CAUSE BEING SHEWN.

Whereas by an order of the 13th day of October instant, it was ordered, that the injunction &c. should be dissolved, unless &c. Now upon motion this day made unto this Court, by Mr. B. being of the defendant's counsel, it was alleged that due notice has been given of the said order to the plaintiff's clerk in court, as by affidavit appears, and that no cause is shewn to the contrary thereof, as by the Registrar's certificate also appears. It was therefore prayed that the said order may be made absolute, which is ordered accordingly. *Quarrie v. Wragg*, L. C. 22d October 1747. Reg. Lib. B. 1747. fol. 58.

No. VIII.

ORDER FOR DISSOLVING INJUNCTION ON
MERITS.

Whereas by an order made the 14th day of July last, for the reasons therein contained it was ordered that the injunction &c. should be dissolved, unless &c. Now upon opening of the matter this present day unto the Right Honourable &c. by Mr. W. being of counsel with the plaintiff, who came to shew cause against the said order, and moved, and offered divers reasons for discharge thereof, and for continuance of the said injunction. Whereupon, and upon hearing of Mr. B. being of counsel with the defendants, and what was alleged on both sides, this Court disallowed the cause now shewn, and doth therefore order that the said injunction be dissolved. *Walker v. Wilkinson*, L. C. 3d August, 1748. Reg. Lib. B. 1747. fol. 412.

For like order. See Hand's Pract. 45. Equity Draftsman, 618.

For order for continuing injunction as to part of the matters mentioned in the bill, and dissolving it as to the rest. See Hand's Pract. 47.

No. IX.

ORDER FOR DISSOLVING INJUNCTION IN DE-
FAULT OF REVIVING.

Upon opening of the matter this present day unto this Court by Mr. E. being of counsel for Thomas Morris and Ann his wife, it was alleged that the plaintiffs having exhibited their bill in this Court, among other things, for an injunction to stay the defendant from proceeding at law for the recovery of the possession of the premises in question in this cause, and &c. and the defendant not putting in her answer in time, the plaintiffs obtained the common injunction; since which the defendant is dead, and administration with the will annexed of the said Jane Fisher, hath been since granted to Ann, the wife of the said Thomas Morris; that the suit being abated, and the plaintiffs neglecting to procure this suit to be

revived, the said A. M. is prevented from proceeding at law for recovery of the possession of the said premises. And therefore it was prayed that the plaintiffs may procure this cause to be revived in a month, and in default thereof, that the said injunction may be absolutely dissolved without further motion; which, upon reading an affidavit of notice of this motion, is ordered accordingly, of which notice is forthwith to be given. *Osburston v. Fisher*, M. R. 12th November, 1747, Reg. Lib. B. 1747. fol. 18.

For like order. See Equity Draftsman, 614.

No. X.

DIRECTION IN DECREE FOR CONTINUING INJUNCTION.

And it is further ordered that the injunction formerly granted in this cause for stay of the defendant's proceedings at law, be in the mean time continued; and the defendant's judgment is to stand as a security for payment of what, if anything, shall appear to be coming to him on the balance of the said account. *Old v. Old*, M. R. 11th July, 1748. Reg. Lib. B. 1747. fol. 459.

NOTE.

Where an injunction has been obtained before the hearing, it will be supported by the decree, unless expressly continued by it. *Old v. Old*, *supra*.

So in the case of a receiver. See Decrees and Orders respecting Receivers, No. X. *post*.

No. XI.

DECREE FOR PERPETUAL INJUNCTION AFTER VERDICT.

[The bill was on behalf of the proprietors of lands within the chapelry, who claimed the right to present. The defendant Benison was the vicar, who also claimed the right, and nominated the defendant

Hodgson, and on his resignation, the defendant Petty, who had been licensed by the bishop. On the original hearing an issue was directed to try the right.]

His Lordship doth declare that the customary right of electing or nominating a curate or chaplain to the chapel of Preston Patrick, within the parish of Burton in Kendal, in the county of Westmoreland, ought to be established according to the said verdict, and doth order and decree the same accordingly. And His Lordship doth declare further, that the Bishop of Chester ought to license such clerk as hath been or shall be nominated, according to the right found by the said verdict, unless some legal objection shall appear to the Bishop against the qualification of such person to be licensed. And doth order that a perpetual injunction be granted against the defendants Benison and Hodgson to stay their proceedings at law in the actions of prohibition and replevin. And that a perpetual injunction be granted against the defendant Petty to restrain him from disturbing any person who hath been or shall be nominated curate or chaplain of the said chapel, pursuant to the right hereby declared and established in the possession or enjoyment of the said chapel, or officiating there. And it is further ordered, that the defendant Benison do pay unto the plaintiffs their costs at law, to be taxed by the said Master; and that the plaintiffs do pay unto the defendant the Bishop of Chester his costs of this suit, to be taxed by the said Master; but as between the plaintiffs and the other defendants, no costs are to be paid on either side in this Court. Hodgson v. Benison, L. C. 31st January, 1747. Reg. Lib. A. 1746. fol. 310.

For decree for quieting possession after verdict, and account of mesne profits. See Edwin v. Morris, L. C. 25th January, 1747. Reg. Lib. A. 1746. fol. 217.

For writ for perpetual injunction after decree against proceeding on agreement respecting tithes. See 1 Fowl. 285.

For writ for perpetual injunction after decree *pro confesso* against proceeding at law. See 1 Fowl. 290.

No. XII.

ORDER FOR SPECIAL INJUNCTION AGAINST
CREDITOR TO RESTRAIN PROCEEDINGS AT
LAW AFTER DECREE. (1)

The Court doth order that the defendants Philip Corral and James Denton do pay unto the said George Syder the costs of the action brought by him against the defendants, as executors of John Mingay, deceased, in His Majesty's Court of K. B. up to the time the said George Syder had notice of the decree in this cause (2) to be taxed by the said Master C. And it is ordered that an injunction be awarded to restrain the said George Syder from further proceeding in the said action. (3) And it is ordered that the said George Syder be at liberty to go before the said Master and prove the debt, for recovery whereof the said action is brought under the decree in this cause. *Fenton v. Corral*, V. C. 21st February, 1815. Reg. Lib. A. 1814. fol. 545.

NOTES.

(1) *Of Decrees as compared with Judgments.*

At law an action cannot be maintained upon a decree, unless for a demand upon which an action might have been brought. *Carpenter v. Thornton*, 3 B. & A. 52. And see *Henley v. Soper*, 8 B. & C. 16.

So a decree cannot be pleaded or given in evidence at law. See *Stasby v. Powell*, Freem. 333. *Darston v. Earl of Orford*, 3 P. W. 401. note. S. C. Prec. in Ch. 188. *Paxton v. Douglass*, 8 Ves. 520.

But in equity a decree is equal to a judgment.

Hence, after a decree for the administration of assets, a creditor will be restrained from proceeding at law. *Fenton v. Corral*, *supra*. *Morrice v. Bank of England*, Ca. Temp. Talb. 217. S. C. 3 P. W. 401. note. 4 Bro. P. C. 287. 3 Swan. 573. *Paxton v. Douglass*, *supra*. And see *Perry v. Phelps*, 10 Ves. 40. *Largan v. Bowen*, 1 Sch. & Lefr. 299. and cases referred to in *Bligh v. Earl of Darnley*, 2 P. W. 621. note. *Robinson v. Tonge*, 3 P. W. 401. note. *Jackson v. Leaf*, 1 J. & W. 232. note. *Drewry v. Thacker*, 3 Swan. 542. note.

But, previously to a decree, an executor may, as at law, confess a judgment. *Waring v. Danvers*, 1 P. W. 294.

In *Robinson v. Tonge*, 3 P. W. 401. the Court thought that after a bill filed, an executor could not make voluntary payments without confessing judgment. And see *Joseph v. Mott*, Prec. in Ch. 79.

But in *Darston v. Earl of Orford*, *supra*, it was held that he might. So in *Maltby v. Russell*, 2 S. & S. 227.

So after an interlocutory decree for an account of the demand of the plaintiff, and payment out of assets, an executor may confess a judgment. *Smith v. Haskins*, 2 Atk. 385. *Perry v. Phelps*, 10 Ves. 41.

But not after a final decree. S. Cs.

And after a decree for the administration of assets, voluntary payments will not be allowed. *Jones v. Jukes*, 2 Ves. jun. 518.

It was formerly held, that in the administration of assets a debt by decree was to be paid before bond debts, but after judgments. *Harding v. Edge*, 1 Vern. 143. And see *Stasby v. Powell*, *supra*.

But it has since been settled, that, as against personal assets, a decree is equal to a judgment, and is to be paid according to its priority. *Gilb. For. Rom.* 87. *Morrice v. Bank of England*, *supra*. *Martin v. Martin*, 1 Ves. 214. *Joseph v. Mott*, *supra*. *Bishop v. Godfrey*, Prec. in Ch. 179. *Searle v. Lane*, 2 Vern. 37. 88. S. C. *Freem.* 103. *Gray v. Chiswell*, 9 Ves. 125. And that a judgment is not entitled to priority over it by relation. *Morrice v. Bank of England*, *supra*.

But the real estate is not bound by it. *Gilb. For. Rom.* *supra*. *Bligh v. Earl of Darnley*, 2 P. W. 621. *Astley v. Powis*, 1 Ves. 496. *Mildred v. Robinson*, 19 Ves. 588. And see *Revival of Sequestration, Orders respecting Execution of Decrees*, *post*.

So, decrees among each other are to be paid according to their priorities. *Abbis v. Winter*, 3 Swan. 578. note.

Decrees are not of themselves notice to a purchaser. *Sugden*, V. & P. 617. Unless they are not final, and, consequently, there is a *lis pendens*. *Ib.* 618.

A final decree is notice to an executor; and if he pays specialty debts, though without actual notice, it is a *devastavit*. *Searle v. Lane*, *supra*.

(2) The creditor is entitled to costs up to notice of the decree.

Fenton v. Corral, *supra*, Paxton v. Douglass, 8 Ves. 521. Jackson v. Leaf, 1 J. & W. 231.

In Drewry v. Thacker, 3 Swan. 541. it was stated by the registrar to be the usual form that the injunction should issue upon payment of the costs. But the Lord Chancellor observed that this was improper, inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might from the situation of the estate, be unable to obtain it in time.

It seems that the costs until notice of the decree should be proved as a debt under the decree. Goate v. Fryer, 2 Cox, 202. S. C. 3 Bro. 24.

The creditor is not entitled to costs subsequent to notice of the decree. Paxton v. Douglass, *supra*. Curre v. Bowyer, 3 Mad. 456. Nor to the costs of the motion. Curre v. Bowyer, *supra*. Anon. 2 S. & S. 424.

(3) In orders for special injunctions to stay proceedings at law, the order is to stay proceedings generally, not with liberty to proceed to trial &c. as in the case of the common injunction. Fenton v. Corral, *supra*. And see Hoggart v. Cottle, No. XIII. *post*. Decree on Bill of Interpleader, No. I. *post*. Orders for Examination of Party *pro interesse suo*, Orders respecting Execution of Decrees, *post*.

No. XIII.

ORDER FOR INJUNCTION TO RESTRAIN ACTION AGAINST AUCTIONEER FOR DEPOSIT.

This Court doth order that the plaintiff, Charles Launcelot Hoggart, be at liberty to pay into the Bank, with the privity of the Accountant-General of this court, to the credit of this cause, the sum of £——. (1) And it is ordered, that the same, when so paid in, be laid out &c. [See Usual Directions, No. XI. *ante*.] And upon the said plaintiffs paying the said sum into the Bank, it is ordered that all proceedings in the action brought by the defendant against the said plaintiff be stayed. (2) And it is ordered that the costs of such action be reserved till the hearing of this cause. Hoggart v. Cottle, V. C. 5th July, 1823. Reg. Lib. A. 1822. fol. 1758.

For like order. See Levy v. Lindo, 3 Mer. 81.

NOTES.

(1) The auctioneer will be allowed to retain the amount of his charges and expenses. *Annesley v. Muggridge*, 1 Mad. 593. *Humphrys v. Hollist*, cited *Ib.* 595. But without prejudice to any question as to the amount retained. *Yates v. Farebrother*, 4 Mad. 239.

(2) See No. XII. Note (3), *ante*.

No. XIV.

ORDER FOR INJUNCTION TO STAY WASTE.

Upon opening of the matter this day unto the Right Honourable the Lord Chancellor, by Mr. W. being of the plaintiff's counsel, it was alleged that &c. as by the affidavit of the said Sir J. T. now produced and read appears; to be relieved wherein the plaintiff hath exhibited his bill unto this Court, as by the Six Clerks' certificate now also produced and read appears. It was therefore prayed that an injunction may be awarded to restrain the defendant, his servants, agents, and workmen, (1) from committing any waste or spoil upon the premises in question, until the said defendant shall fully answer the plaintiff's bill, and (2) this Court make other order to the contrary; which is ordered accordingly. *Trevelyan v. Trevelyan*, L. C. 21st July, 1747. Reg. Lib. B. fol. 410.

For like order. See *Equity Draftsman*, 586.

For writ of injunction to stay waste. See *Harr.* 557.

For like writ in the Exchequer. See 1 *Fowl.* 277.

NOTES.

(1) Although the bill and notice of motion should pray an injunction against the defendant only, the order is invariably extended to his servants, agents, and workmen. *Humphreys v. Roberts*, V. C. 3d March, 1829. *Ex relatione* Mr. Tinney. And see *Chamberlayne v. Dummer*, No. XV. *post.* *Mount v. Fenner*, No. XX. *post.* *Bainbridge v. Briggs*, No. XXI. *post.* *Jefferys v. Bowles*, No. XXII. *post.*

And see *Writs of Injunction*, *supra*.

In *Harvey v. Montague*, 1 Vern. 57. 122. a person not a party to the suit acting in contravention of a decree for an injunction, of which he had notice, was held bound by it. But see *Iveson v. Harris*, 7 Ves. 256.

(2) Formerly special injunctions were granted in various forms ; as until further order. Or until appearance and further order. Or until answer and further order. See Eden on Injunctions, 325. 1 Fowl. 279. Trevelyan v. Trevelyan, *supra*. Smith v. Hakewell. No. XVI. *post*. Dyson v. Benson, No. XVIII. *post*. Mount v. Fenner, No. XX. *post*. Jefferys v. Bowles, No. XXII. *post*.

But the form at present used, and which is established by a rule laid down by Lord Eldon, is till answer or further order, which has been adopted as giving the defendant liberty to move, if necessary, to dissolve the injunction upon affidavit. See Eden on Injunctions, *supra*, and note. And see Earnshaw v. Thornhill, 18 Ves. 488. Vipian v. Mortlock, 2 Mer. 479. Gee v. Pritchard, 2 Swan. 406. Chamberlayne v. Dummer, No. XV. *post*. White v. White, No. XVII. *post*. Brook v. Cooke, No. XIX. *post*. Bainbridge v. Briggs, No. XXI. *post*.

No. XV.

ORDER FOR INJUNCTION TO RESTRAIN EQUIT- ABLE WASTE. (1)

[*Inter alia*] Let an injunction be awarded to restrain the defendant Harriott Dummer, her servants, workmen, and agents, (2) from cutting down any timber or other trees growing on the estate in question, which are planted or growing there for the protection or shelter of the several mansion houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas, or otherwise, for the ornament of the said houses, or of the gardens, or parks, or pleasure grounds thereunto belonging. And let the said injunction also extend to restrain the defendant Harriott Dummer, her servants, workmen, and agents, from cutting down any timber or other trees, except at seasonable times, and in an husband-like manner ; and likewise from cutting down saplings and young trees, not fit to be cut as and for the purposes of timber, until the hearing of this cause or (3) the further order of the Court. Chamberlayne v. Dummer, L. C. 9th July, 1782. Reg. Lib. A. 1781. fol. 421. S. C. 1 Bro. 166. 2 Dick. 600.

NOTES.

(1) This is said to be the form always used in the case of equitable waste. See Eden on Injunctions, 182. And see Lord Tamworth v. Lord Ferrers, 6 Ves. 420.

(2) See No. XIV. Note (1), *ante*.

(3) See No. XIV. Note (2), *ante*.

No. XVI.

ORDER FOR INJUNCTION TO RESTRAIN NEGOTIATION OF NOTE.

His Lordship doth order that the defendants be restrained from parting with out of the custody of them or any of them, or indorsing assigning or negotiating, the promissory note in question, dated on or about the 1st day of August, 1744, mentioned in the plaintiff's bill and affidavit, until the said defendants shall have appeared to and answered the plaintiff's bill, and (1) the further order of this Court. *Smyth v. Hake-well*, L. C. 20th October, 1746. Reg. Lib. B. 1746. fol. 468.

NOTE.

(1) See No. XIV. Note (2), *ante*.

No. XVII.

ORDER FOR INJUNCTION TO RESTRAIN TRANSFER OF STOCK BY EXECUTRIX.

This Court doth order that the defendant Betty White be restrained by the injunction of this Court from transferring any stock standing in the name of Roger White the testator in the pleadings named, or in the name of the said Betty White, as the executrix of the said Roger White, and purchased with the assets of the said testator. And it is ordered, that the Governor and Company of the Bank of England (1) be also restrained by the injunction of this Court from permitting such transfer to be made, until the said defendant shall fully answer the plaintiff's bill, or (2) this Court make other order

to the contrary. *White v. White*, V. C. 4th February, 1828. Reg. Lib. B. 1827. fol. 898.

NOTE.

(1) By statute 39 & 40 Geo. 3. c. 36. the Court is empowered to restrain the Bank of England, the East India and South Sea Companies from transferring stock, although the Companies are not made parties to the suit.

But this does not prevent the Bank &c. being made parties. *Temple v. Bank of England*, 6 Ves. 770.

Nevertheless, where the Bank are unnecessarily made parties, the bill will be dismissed as to them, with costs to be paid by the plaintiff. *Edridge v. Edridge*, 3 Mad. 386.

The Bank having been made parties for the security of a legacy, their costs were directed to be paid out of the capital of the legacy. *Hammond v. Neame*, 1 Swan. 38.

The application for an injunction against the Bank under the statute is not of course, but must be made upon notice to the defendants, or an affidavit, as in a case of waste. *Hammond v. Maundrell*, 6 Ves. 773. note.

If, after giving notice to the Bank of the filing of the bill, the plaintiff does not move for an injunction, the defendant may obtain an order that the Bank may permit the transfer, unless the plaintiff obtains an injunction within a limited time. *Ross v. Skinner*, 5 Mad. 458. S. C. 6 Mad. 1.

When a transfer of stock is sought to be restrained, the usual mode of proceeding is to obtain a *distringas* from the Court of Exchequer against the Bank, which will restrain the transfer for a limited time, within which an injunction may be obtained.

(2) See No. XIV. Note (2), *ante*.

No. XVIII.

ORDER FOR INJUNCTION AGAINST PARTNER.

This Court doth accordingly order that an injunction be awarded against the said Joseph Benson, his agents and servants, from entering into any contract or contracts, and from accepting, drawing, indorsing or negotiating any bills or bill

of exchange, notes or note, or written securities or security, in the name of the said co-partnership firm of Dyson v. Benson; and from contracting any debts or debt, and buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing or causing to be done any acts or act in the name or on the credit of the said partnership firm of Dyson and Benson, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sums or sum of money, or for the performance of any contract promise or undertaking, until the said defendant shall fully answer the plaintiff's bill, and (1) the further order of this Court. Dyson v. Benson, V. C. 21st October, 1815. Reg. Lib. A. 1814. fol. 1531.

For order for surviving partner to give security for partnership effects. See Hand's Pract. 67.

NOTE.

(1) See No. XIV. Note (2). *ante*.

No. XIX.

ORDER FOR INJUNCTION AND RECEIVER
AGAINST EXECUTOR AND GUARDIAN.

This Court doth order that the said defendant John Cooke be restrained by the injunction of this Court from receiving or collecting any part of the outstanding personal estate and effects of W. B. the testator in the pleadings named, and from receiving or collecting any part of the debts due and owing in respect of the business or concern of a bricklayer, carried on by the said W. B. up to the time of his death, and afterwards by the said John Cooke; and also from receiving or collecting any part of the freehold and copyhold estate of the said W. B. and from letting or managing the same, or interfering therewith, or with any other part of the said testator's estate or effects, until the said defendant shall fully answer the plaintiff's bill, or (1) this Court make other order to the contrary. And it is ordered, that it be referred to

Mr. S. one &c. to appoint a proper person to receive the rents and profits of the said testator's freehold and copyhold estates, and to collect and get in his outstanding personal estate, and the debts due or owing in respect of the said testator's business of a bricklayer &c. [See Decrees &c. respecting Receivers, No. IV. *post.*] *Brooke v. Cooke*, V. C. 24th May, 1815. Reg. Lib. A. 1814. fol. 839.

NOTE.

(1) See No. XIV. Note (2), *ante*.

No. XX.

ORDER FOR INJUNCTION TO RESTRAIN INFRINGEMENT OF COPYRIGHT BY PATENT.

Upon motion this day made unto the Court by Mr. Attorney-General and Mr. Solicitor-General of counsel with the plaintiffs, it was alleged that the plaintiff Baskett, who is his Majesty's printer, and the other plaintiffs assignees of the estate and effects of the plaintiff Baskett, under a commission of bankruptcy awarded against him, are by letters patent granted by King Charles the Second, the 24th of December, in the 27th year of his reign, and by an assignment thereof from the patentees to the plaintiff Baskett, entitled to the sole right, privilege, and advantage, of printing all statute books and acts of parliament, Bibles, Books of Common Prayer, and other rites and ceremonies of the Church of England, and other things therein mentioned; and notwithstanding all other persons, save the patentees and their assigns, are by the said letters patent prohibited and enjoined from printing the same, that the defendant has lately printed, or is now printing, a Common Prayer Book, commonly called the Nonpareil, in twenty-fours; to be relieved wherein the parties have exhibited their bill in this Court, as by the Six-Clerks' certificate appears. It was therefore prayed that an injunction be awarded to stay the defendant, his servants, workmen, and agents(1), from printing, publishing, and vending(2) the said Common Prayer Book; which, upon

reading an affidavit of A. B. this Court held reasonable, and doth order the same accordingly, until the defendant shall have fully answered the plaintiff's bill, and (3) this Court take other order to the contrary. *Mount v. Fenner*, M. R. 29th June, 1732. Reg. Lib. B. 1731. fol. 348. S. C. cited 2 Dick. 676.

For writ of injunction for like purpose in Exchequer. See 1 Fowl. 305.

For writ of injunction to restrain copying prints. See Harr. 558.

NOTE.

(1) See No. XIV. Note (1), *ante*.

(2) The injunction sometimes extends to exposing to sale. See *Tonson v. Walker*, 3 Swan. 681. *Jefferys v. Bowles*, No. XXII. *post*. And Writ of Injunction in the Exchequer, *supra*.

(3) See No. XIV. Note (2), *ante*.

No. XXI.

ORDER FOR INJUNCTION TO RESTRAIN PARTIAL INFRINGEMENT OF COPYRIGHT.

This Court doth order that an injunction be awarded to restrain the defendant, his servants, agents, or workmen (1), from printing, publishing, selling (2), or otherwise disposing of, such parts of the book in the bill mentioned to have been published by the defendant as hereinafter specified, viz. that part of the said book of the said defendant which is entitled "Scale of Flats and Sharps" &c. and also that part of the book of the said defendant which is entitled "Scale, or Gamut" &c. and also that part of the book of the said defendant, entitled "Exercise I." until the said defendant shall fully answer the plaintiff's bill, or (3) this Court make other order to the contrary. *Bainbridge v. Briggs*, V. C. 31st October, 1815. Reg. Lib. A. 1814. fol. 1536.

NOTES.

(1) See No. XIV. Note (1), *ante*.

(2) See No. XX. Note (2), *ante*.

(3) See No. XIV. Note (2), *ante*.

No. XXII.

ORDER FOR INJUNCTION ON INFRINGEMENT OF
COPYRIGHT IN ENGRAVINGS.

Upon opening of the matter this present day unto the Right Honourable, &c. by Mr. Attorney-General, being of the plaintiff's counsel; it was alleged that the plaintiff hath at considerable expense, contrived and invented a method of teaching young persons the use of maps and charts, by means of three copper-plates, the first of which he published on the 1st of January, 1768, entitled the Royal Geographical Pastime &c. and the second thereof, entitled &c. and the third plate thereof, entitled &c. the plaintiff published on the 1st of January last; and all the said three plates had at the respective times of publishing the same, the name of the plaintiff as the proprietor and publisher thereof, engraved on each plate, printed on every such print or prints as directed by or agreeable to an Act of Parliament made in the eighth year of the reign of his late Majesty King George II. entitled "An Act for the encouragement of the Arts" &c. That the margins of the said copper-plate prints were illustrated by historical and geographical notes &c. That the defendant did on the 1st day of January last, without the licence or consent of the plaintiff, print, publish, and sell, and still continues to sell, as the plaintiff believes, by seeing the same exposed to sale at the shop window of the defendant, an engraving or copper-plate copied from, and very nearly the same size and scale as the plaintiff's said first plate called the Royal &c. under the title of the Royal Geographical Amusement &c. That the engraving or plate, or the prints taken therefrom, and published by the defendant, have the same directions or instructions, and are in all respects the same as the plaintiff's first plate, save only an affected variation in the historical and geographical anecdotes in the margin of no consequence whatever, as by affidavit of the plaintiff now produced and read appears; to be relieved wherein and for an injunction the plaintiff hath exhibited his bill into this Court against the defendant as by

the Six Clerks' certificate now produced and read appears. It was therefore prayed that an injunction may be awarded to restrain the defendant, his servants, workmen, and agents, (1) from printing, or causing to be printed, any more copies of the said plate, and from selling, or exposing to sale, (2) or bartering, or otherwise disposing of any copies thereof now remaining unsold, until the defendant shall fully answer the plaintiff's bill, and (3) this Court make other order to the contrary; which is ordered accordingly. *Jefferys v. Bowles*, Lords Commissioners, 19th February, 1770. Reg. Lib. A. 1769. fol. 161. S. C. 1. Dick. 429.

For writ of injunction to restrain copying engravings. See Harr. 558.

NOTES.

(1) See No. XIV. Note (1), *ante*.

(2) See No. XX. Note (2), *ante*.

(3) See No. XIV. Note (2), *ante*.

No. XXIII.

ORDER FOR REFERENCE IN SUIT FOR INFRINGEMENT OF COPYRIGHT.

Their Lordships do by consent order that it be referred to Mr. P. one &c. to see whether the copper-plate published by the defendant, entitled &c. is of the same size and scale, and has the same marginal notes and directions or instructions, and is in all respects the same as the first plate published by the plaintiff entitled &c. save an affected variation in the historical and geographical anecdotes in the margin. And the said Master is to state the same with his opinion thereon to the Court, and thereupon such further order shall be made relating thereto as shall be just. *Jefferys v. Bowles*, Lords Commissioners, 17th March, 1770. Reg. Lib. A. 1769. fol. 267. S. C. 1 Dick. 429.

For like order not by consent. See *Trusler v. Cummings*, L. C. 11th May, 1773. Reg. Lib. E. 1772. fol. 284. S. C. 1 Dick. 429. note.

No. XXIV.

ORDER FOR DISSOLVING SPECIAL INJUNCTION.

Whereas the plaintiff obtained an injunction to restrain the defendant, his servants &c. from committing any waste &c. until the defendant should have fully answered the plaintiff's bill and this Court make other order to the contrary. Now upon opening of the matter this present day unto the Right Honourable &c. by Mr. Solicitor-General &c. being of the defendant's counsel, it was alleged that the defendant has since put in a full and perfect answer to the plaintiff's bill, and thereby denies the whole equity thereof. Whereupon and upon hearing of Mr. Attorney-General &c. of counsel for the plaintiff, and of what was alleged &c. his Lordship doth order that the said injunction be dissolved. *Norton v. Aylett*, L. C. 22d April, 1749. Reg. Lib. B. 1748. fol. 318. S. C. 2 Dick: 793, note.

NOTE.

Formerly where special injunctions were granted till answer and further order [See No. XIV. Note (2), *ante.*] they might be dissolved like the common injunction [See No. III. *ante.*] by an order *nisi* on the coming in of the answer. See *Countess of Strathmore v. Bowes*, 2 Dick. 675. S. C. 1 Cox, 263. *Trusler v. Cummings*, L. C. 28th April, 1773. Reg. Lib. B. 1772. fol. 432.

Or by an original motion upon the coming in of the answer without an order *nisi*. *Norton v. Aylett*, *supra*. *Mount v. Fenner*, M. R. 25th July, 1732. Reg. Lib. B. 1731. fol. 383. S. C. [*Mount v. Turner*,] 2 Dick. 793.

But since special injunctions have been granted till answer or further order [See No. XIV. Note (2), *ante.*] the defendant may move at any time. See *Earnshaw v. Thornhill*, 18 Ves. 488. *Vipan v. Mortlock*, 2 Mer. 479.

No. XXV.

DECREE FOR PERPETUAL INJUNCTION TO RESTRAIN INFRINGEMENT OF COPYRIGHT.

Their Lordships do order and decree that the injunction formerly granted in this cause for stay of the defendants,

their servants, agents, or workmen, from printing, publishing, or vending, a book, comedy, or farce, called “ Love à-la-mode,” or any part thereof, be made perpetual. And the plaintiff waiving the account prayed by the bill, their Lordships do not think fit to direct any account. And it is further ordered that the defendants do pay to the plaintiff his costs of this suit, to be taxed by Mr. G. one &c. *Macklin v. Richardson*, Lords Commissioners, 5th December, 1770. Reg. Lib. B. 1770. fol. 35. S. C. Ambl. 694.

NOTE.

(1) If the cause is brought to a hearing, a decree will be made for a perpetual injunction and an account of profits. See *Macklin v. Richardson*, *supra*.

But this is seldom done. See *Whittingham v. Wooller*, 2 Swan. 430. note.

DECREES AND ORDERS RESPECTING RECEIVERS.

No. I.

ORDER FOR RECEIVER OF REAL ESTATE. (1)

His Lordship doth order that it be referred to Mr. C. one &c. to appoint (2) a proper person to be receiver of the rents and profits of the estates, situate at ———, in the pleadings in this cause mentioned, and to allow him a proper salary (3) for his care and pains therein; the person so to be appointed receiver first giving security (4), to be approved of by the said Master, and to be taken before a Master Extraordinary in the country, if there should be occasion, duly and annually to account for and pay what he shall so receive, as is hereafter directed, or as the Court shall direct. And the tenants of the said estates are to attorn (5), and pay their rents in arrear and growing rents to such receiver; who is to be at liberty to let (6) and set the said estates from time to time, with the approbation of the said Master, as there shall be occasion. And it is ordered, that the said receiver do from time to time pass his accounts (7) before the said Master, and pay the balances that shall be reported due from him into the Bank, with the privity of the Accountant-General of this Court, to be there placed to the credit of this cause, subject to the further order of this Court. *Metcalf v. Pulvertoft*, L. C. 16th January, 1813. Reg. Lib. B. 1812. fol. 505. S. C. 1 V. & B. 180.

For like orders. See *Equity Draftsman*, 660. 662. 1 *Turn. Pract.* 247.

NOTES.

(1) The form of a decree for a receiver is the same with that of an interlocutory order.

(2) *Appointment.*

The order is that the Master shall appoint, not approve, as in the case of a guardian. *Bowersbank v. Colasseau*, 3 Ves. 165. *Creuze v. Bishop of London*, 2 Dick. 687. S. C. 2 Bro. 253. And see *Decrees respecting Executors, &c.* No. IV. *ante*, *Decrees &c. respecting Infants*, No. VIII. *ante*. His discretion is not to be controuled, but upon a strong ground. See *Creuze v. Bishop of London*, *supra*. *Thomas v. Dawkin*, 1 Ves. jun. 452. S. C. 3 Bro. 508. *Garland v. Garland*, 2 Ves. jun. 137. *Bowersbank v. Colasseau*, 3 Ves. 164. *Anon.* 3 Ves. 515. *Wilkins v. Williams*, 3 Ves. 588. *Tharpe v. Tharpe*, 12 Ves. 317. *Wynne v. Lord Newborough*, 15 Ves. 283.

The right to propose a person as receiver belongs, in the first instance, to the parties interested in the suit. *Attorney-General v. Day*, 2 Mad. 257. A stranger cannot propose a person as receiver, *Ib.* 256. Whether, where the parties neglect to propose a person as receiver, the Master can himself propose one. Q. *Ib.* 254. The Master having appointed a receiver upon his own nomination, was, under the circumstances, directed to review his report. *Ib.* 257. It is the duty of the Master to appoint the person whom he thinks most fit, without regard to who may propose or recommend him. *Lespinasse v. Bell*, 2 J. & W. 436. A party to the suit cannot propose himself as receiver, without the leave of the Court. See *Davis v. Duke of Marlborough*, 2 Swan. 118. And see *Jefferys v. Smith*, No. V. *post*.

(3) *Salary.*

The usual allowance is 5*l.* per cent. on the gross rental of the estates, 1 Turn. Pract. 258. But this is the maximum; and where the rental is very considerable, a per centage at a much lower rate would be allowed, or a stated salary sufficient to compensate the receiver's services. *Ib.* He may be entitled to an allowance beyond his salary for extraordinary trouble and expenses. See *Potts v. Leighton*, 15 Ves. 276. But not without a previous order authorising it. *In matter of Ormsby*, 1 Ba. & Be. 189.

(4) *Security.*

The security usually required is his own recognizance with that of two sureties. See *Mead v. Lord Orrery*, 3 Atk. 237. The taking an assignment of a mortgage belonging to the receiver instead of it,

is very improper, *Ib.* For the form of the recognizance. See 2 Turn. Pract. 470. 2 Fowl. 380. Under special circumstances a receiver will be appointed upon his own recognizance only. Countess of Carlisle v. Lord Berkley, Ambl. 599. Ridout v. Earl of Plymouth, 1 Dick. 68. Hibbert v. Hibbert, 3 Mer. 681. By the practice of the Petty Bag Office the recognizance must be enrolled within six months. See Bothomley v. Fairfax, 1 P. W. 340. But leave will be given to enrol it, *nunc pro tunc*, *Ib.* Vaughan v. Vaughan, 1 Dick. 90. But whether so as to prejudice intervening incumbrances. Q. See Fothergill v. Kendrick, 2 Vern. 234.

Sureties for Receiver.

The surety is entitled to stand in the place of the receiver, and to be indemnified out of a balance in Court due to the receiver. Glossop v. Harrison, Coop. 61. S. C. 3 V. & B. 134. A creditor of the receiver by bill given for goods supplied to the estate (a colliery), the bill being dishonoured, was ordered to be paid out of a fund in Court, applicable to payment of a balance due to the receiver. Tempest v. Ord, 1 Mad. 89. An action having been brought against a surety on his recognizance, an order was made to refer it to the Master to inquire what was due from the receiver, and that the amount should be paid by the surety by instalments, and that proceedings should be stayed in the action. Walker v. Wild, 1 Mad. 528. The order was made by consent, but was said by the Court to be regular.

Sureties are liable for interest as well as the receiver. Dawson v. Raynes, 2 Russ. 466.

Sureties will not be discharged at their own request, unless under special circumstances. Griffith v. Griffith, 2 Ves. 400.

Discharge.

When the receiver has passed his final account, and paid his balance, his recognizances will be vacated. See 1 Turn. Pract. 263. 2 Fowl. 391.

In the case of an infant's estate the receiver should not be discharged until a year after the party attains twenty-one. See 1 Turn. Pract. 263. 2 Mad. Chan. 240.

See Order for passing Accounts of deceased Receiver, No. XL. *post.*

For order for vacating recognizance of receiver. See Equity Draftsman, 615.

(5) *Attornment.*

possession, he will be ordered to deliver
Griffith v. Griffith, 2 Ves. 401. Davis
n. 116.

to attorn. Metcalf v. Pulvertoft,

attornments by tenants to
made in pursuance of a judgment at
a court of equity.

attornment. See Effect of Sequestration, Orders
Execution of Decrees, *post*.

Distraining.

Orders have been made that receivers might be at liberty to
distrain. Shelly v. Pelham, 1 Dick. 120. Mitchell v. Duke of
Manchester, 2 Dick. 787. But it seems that if the tenants have
attorned, an order is unnecessary. See Raincock v. Simpson, 1 Dick.
120. note. Hughes v. Hughes, 1 Ves. jun. 161. S. C. 3 Bro. 87.
Pitt v. Snowden, 3 Atk. 750. In Brandon v. Brandon, 5 Mad. 473.
The registrar stated the practice to be for a receiver to distrain upon
his own discretion for rent in arrear within the year; but if in arrear
for more than a year, that then an order was necessary.

Tenants have been directed to pay their rents within a given time,
or to stand committed, on the first application. Mitchell v. Duke of
Manchester, *supra*.

(6) *Letting.*

Formerly liberty to let and set was given upon motion, but it is
now made part of the order. See Neale v. Bealing, 3 Swan. 304.
note. The receiver has power to determine tenancies from year to
year by notice to quit. Doe v. Read, 12 E. R. 59. But he cannot
turn out tenants without an application to the Master. Wynne v.
Lord Newborough, 1 Ves. jun. 165. S. C. 3 Bro. 88.

By Lord Lyndhurst's orders, 64. 2 Russ. (Appendix) 22. it is
ordered, that in every order directing the appointment of a receiver
of a landed estate, there is to be inserted a direction that such
receiver shall manage, as well as set and let, with the approbation of
the Master; and that, in acting under such an order, it shall not be
necessary that a petition be presented to the Court in the first in-
stance, but the Master, without special order, shall receive any pro-

posal for the management or letting of the estate from the parties interested, and shall make his report thereon, which report shall be submitted to the Court for confirmation, in the same manner as is now done with respect to reports on such matters made upon special reference ; and until such report be confirmed, it shall not give any authority to the receiver.

(7) *Accounting.*

If a receiver does not pay in his balances he will be deprived of his salary and charged with interest. *Potts v. Leighton*, 15 Ves. 273. ——— *v. Jolland*, 8 Ves. 72. *Fletcher v. Dodd*, 1 Ves. jun. 85. Upon default of payment either his sureties may be proceeded against or he may be committed. *Davies v. Cracraft*, 14 Ves. 143.

For orders with a view to enforce the regularity of receivers in passing their accounts. See order of the 15th Dec. 1792, *Beames*, 454. Order of the 23d April, 1796, *Beames*, 461.

And by Lord Lyndhurst's orders, 63. 2 Russ. (Appendix) 22. It is ordered, that the Master, in acting upon the order of the 23d April, 1796, shall be at liberty upon the appointment of a receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the receiver's accounts and payment of his balances, to fix either longer or shorter periods at his discretion ; and when such other periods are fixed by the Master, the regulations and principles of the said order shall in all other respects be applied to the said receiver.

Although a receiver passes his accounts, and pays his balances regularly, he cannot make interest for his own benefit of such sums as may from time to time be in his hands. *Shaw v. Rhodes*, 2 Russ. 539.

Special directions are sometimes given as to the mode in which a receiver is to account. See *Jeffreys v. Smith*, No. V. *post*.

For order for liberty to receiver to pay in part of his balance. See *Hand's Pract.* 183.

For order for laying out sums paid in by receiver. See *Hand's Pract.* 184.

Confirming Report.

The Master makes two reports in pursuance of the order. By the first of which he approves the proposal of the receiver and of his sureties, and settles the recognizance. And by the second, he appoints the receiver upon the acknowledgment and enrolment of the recognizance. See 1 *Turn. Pract.* 249. 250.

The reports are then filed, *Ib.*

In *Thomas v. Dawkins*, 3 Bro. 508. S. C. 1 Ves. jun. 452. the Lord Chancellor doubted whether exceptions would lie to the Master's report of the appointment of a receiver. And see *Hughes v. Williams*, 6 Ves. 459.

But it has been held that exceptions would lie. *Creuze v. Bishop of London*, 2 Dick. 687. S. C. 2 Bro. 253. *Garland v. Garland*, 2 Ves. jun. 137. *Wilkins v. Williams*, 3 Ves. 588. *Tharpe v. Tharpe*, 12 Ves. 317.

Otherwise in the case of guardian. See Decrees respecting Infants, No. IX. Note. *ante*.

The report may be brought before the Court by petition. *Wynne v. Lord Newborough*, 15 Ves. 283. *Attorney-General v. Day*, 2 Mad. 246.

If the report is not objected to, no further order is necessary.

The Master's report of a receiver's account does not require confirmation, and does not therefore admit of exceptions. *Shewell v. Jones*, 2 S. & S. 172.

But where the principle upon which the Master has proceeded is controverted, the report may be brought before the Court on petition, S. C. So in the case of taxation of costs. See Orders respecting Solicitors, No. II. Note. *post*.

No. II.

INQUIRY AS TO REPAIRS.

[*Inter alia*] And it is further ordered that the said Master do inquire whether it will be for the benefit of the estate that the testator's house in Cavendish-square should be put in repair. And if the said Master should find that it will, it is further ordered, that then so much as the said Master shall find to be sufficient for such repairs be laid out accordingly, and be paid by the receiver out of the personal estate, and be allowed to him in passing his accounts. And it is further ordered that the said Master do make a separate report, touching &c. and the repairs of the testator's house in Cavendish-square. *Gibson v. Lord Montfort*, L. C. 25th June, 1750 Reg. Lib. A. 1749. fol. 583. S. C. 1 Ves. 485. Ambl. 93.

*Decrees &c. respecting Receivers.**Repairs.*

Formerly the Court never permitted a receiver to lay out money without a previous order; but now where the receiver has laid out money without such previous order it is usual to refer it to the Master, to see whether it was for the benefit of the persons interested. *Tempest v. Ord*, 2 Mer. 56. And see *Attorney-General v. Vigor*, 11 Ves. 563. *Blunt v. Clitherow*. 6 Ves. 799. *Morris v. Elme*, 1 Ves. jun. 139.

No. III.

ORDER FOR RECEIVER WHERE PRIOR INCUMBRANCES.

His Lordship doth order that it be referred to Mr. J. one &c. to appoint a proper person to be receiver of the rents and profits of the capital mansion-house &c. But the appointment of the said receiver is not to affect prior incumbrancers upon the said estates and premises, who may think proper to take possession of the said estates and premises, by virtue of the said securities respectively. And it is ordered that the said Master do also allow to such person so to be appointed &c. [See No. I. *ante*.] And it is ordered that the said Master do inquire what incumbrances there are affecting the said estates and premises, and also into the priorities thereof respectively. For the better discovery whereof &c. [See Usual Directions, No. II. *ante*.] And it is ordered that the person so to be appointed receiver as aforesaid do, out of the rents and profits so to be received by him, keep down the interest and payments in respect of the said incumbrances, according to their priorities, and pay the balances thereof, which shall be from time to time reported due from him, into the Bank, with the privity &c. [See Usual Directions, No. X. *ante*.] *Davis v. Duke of Marlborough*, L. C. 5th March, 1818. Reg. Lib. A. 1817. fol. 873. S. C. 2 Swan, 115. 1 Swan. 74.

NOTE.

Prior Incumbrances.

In *Phipps v. Bishop of Bath and Wells*, 2 Dick. 608. it was held that where the first mortgagee declined taking possession, a receiver

could not be obtained on the application of a second mortgagee, without the consent of the first mortgagee.

But where there are prior mortgagees or incumbrancers, who are not in possession, an order will be made for a receiver without prejudice to such mortgagees or incumbrancers taking possession. *Davis v. Duke of Marlborough, supra.* And see *Bryan v. Connick*, 1 Cox, 422. *Dalmer v. Dashwood*, 2 Cox, 383. *Norway v. Rowe*, 19 Ves. 153.

Where there are prior incumbrances, the receiver will be directed to keep down the interest of them. *Davis v. Duke of Marlborough, supra.*

And it will be referred to the Master to ascertain their priorities. *Davis v. Duke of Marlborough, supra.* And see *Couraud v. Hanmer*, No. VIII. *post.*

No. IV.

ORDER FOR RECEIVER IN CASE OF PARTNERSHIP.(1)

[The plaintiffs were the assignees of David Glover.]

His Lordship doth order that it be referred to Mr. A. one &c. to appoint a proper person to be receiver of the outstanding debts and effects of the late partnership of David Glover, Daniel Glover, Thomas Glover, and John Glover, in the pleadings of this cause mentioned, and to allow him &c. [See No. I. *ante.*] such person so be appointed receiver, first giving security &c. [See No. I. *ante.*] to be answerable for what he shall receive of such outstanding debts and effects, and to pay the same as this Court hath hereby directed, and shall hereafter direct. And it is ordered that the defendants Daniel Glover, John Glover, and Thomas Glover, do deliver over to such person so to be appointed receiver, all securities in their hands for such outstanding debts and effects, together with all books and papers relating thereto. And in case there shall be occasion to put any of the debts in suit for the recovery thereof, the same is to be done with the approbation of the said Master.(2) And such person so to be appointed is to make use of the names of the plaintiffs and defendants, or either of them, for that purpose; who are to be indemnified

therein out of the said estate and effects. And it is ordered that the person so to be appointed receiver, do from time to time annually pass his accounts &c. [See No. I. *ante.*] *Harden v. Glover*, L. C. 10th August, 1810. Reg. Lib. A. 1809. fol. 924. S. C. (*Harding v. Glover*) 18 Ves. 281.

NOTES.

(1) See *Skipp v. Harwood*, 1 Dick. 114. S. C. 3 Atk. 564.

(2) The approbation of the Master is sometimes dispensed with. See *Jefferys v. Smith*, No. V. *post.*

No. V.

ORDER FOR MANAGER AND RECEIVER OF A COLLIERY.

His Lordship doth order that it be referred to Mr. J. one &c. to appoint a proper person to take and have the management of the partnership colliery, stock, and effects, and to have the direction and superintendence of the working the said partnership mines, and the carrying on the partnership trade in question, and to collect and get in the outstanding debts and effects belonging to the said partnership. And each of the partners of and in the said colliery and trade, who shall shew to the satisfaction of the said Master that he is a partner of and in the said colliery, regularly admitted as such by the other partners or owners thereof, and legally entitled to a share of the mines belonging thereto, and to receive a share of the profits of the said colliery, is to be at liberty to propose himself, (1) or such other person as he shall think fit, (such other person being a practical miner,) to the said Master to be appointed such manager and receiver. And the said Master is to be at liberty, if he shall see occasion, to proceed *de die in diem*, in the appointing of such manager and receiver. And the said Master is to make such person so to be appointed an allowance in respect thereof. But such person so to be appointed is first to give security to be allowed of &c. [See No. I. *ante.*] duly to manage the said partnership colliery, and to be accountable for what he shall so receive in respect thereof, and to pay the same as this Court hath hereby

directed and shall hereafter direct. And it is ordered that the plaintiffs and defendants do deliver over to such person so to be appointed manager and receiver, the stock, goods, effects, books, and accounts belonging to the said partnership. And the said manager and receiver is to be at liberty to bring actions as there shall be occasion (2) for the recovery of such of the debts as are now due, or shall hereafter become due, in the names of the parties or either of them ; and the person or persons in whose name such action shall be brought, is or are to be indemnified against the costs and charges thereof out of the stock, goods, and effects of the said partnership, and out of the money to be received in respect of the said debts, by the said manager and receiver. And it is ordered that he do pay the debts due, and to become due, from the said partnership. And it is ordered that the said manager and receiver do pass his accounts before the said Master half-yearly ; and after retaining (3) in his hands such sum of money as the Master shall deem sufficient for carrying on the said colliery, do pay the balances as the same shall become due from him into the bank with the privity &c. subject to the further order of this Court. *Jefferys v. Smith*, L. C. 29th April, 1820, Reg. Lib. A. 1819. fol. 2556. S. C. 1 J. & W. 298.

NOTE.

(1) See No. I. Note (2), *ante*.

(2) See No. IV. Note (1), *ante*.

(3) See No. I. Note (7), *ante*.

No. VI.

ORDER FOR RECEIVER OF PROPERTY IN
AMERICA.

[*Inter alia*] It is ordered, that the said Master do appoint a proper person or persons to be a receiver or receivers of the rents and profits of the said testator's real estates in America, and also to collect and get in the outstanding personal estate of the said testator in America, and make him or them a reasonable allowance in respect thereof ; such person or per-

sons, so to be appointed receiver or receivers in America, is or are first to give security (1) to be approved of by the said Master, to be answerable for and to remit what he or they shall so receive to a proper person in London, to be also approved of by the said Master to receive the same. And the said Master is to make such person, to whom the same shall be so remitted, a reasonable allowance (2) in respect thereof; but such person is first to give security, to be approved of by the said Master, duly to account for and pay what he shall so receive, as this Court shall direct. And the tenants of the said estates are to attorn, and pay their rents in arrear and growing rents to such receiver or receivers; who is or are to be at liberty to let and set the said estates, with the approbation of the Master, as there shall be occasion. And it is ordered, that such person so to be appointed in London, to whom the monies aforesaid are to be so remitted, do pass his accounts annually before the said Master, and pay the balances which shall be reported due from him into the Bank, with the privy &c. [See Usual Directions, No. X. *ante.*] And it is ordered, that the said Master do consider and state to the Court, whether any and what steps, ought to be taken by such receiver or receivers so to be appointed to enforce the payment of any and which of the outstanding debts due to the said late testator in America, and out of what fund the necessary expense attending the same, and also the allowances to the said receiver or receivers, should be paid. *Hanson v. Walker*, M. R. 12th May, 1815. Reg. Lib. A. 1814. fol. 1219.

For order for receiver of estate in Ireland. See *Equity Draftsman*, 613.

For orders for manager of West India estate. See *Cunyngham v. Cunyngham*, L. C. 31st July, 1750. Reg. Lib. A. 1749. fol. 635. S. C. 1 Ves. 522. *Belt's Supplement*, 232. *Equity Draftsman*, 636, 637. 2 *Newl. Pract.* 349.

NOTES.

(1) A manager of a West India estate is not required to give

security faithfully to manage, but only to consign, or otherwise account for the produce. *Morris v. Elme*, 1 Ves. jun. 139. *Rutherford v. Wilkinson*, No. VII. *post*.

In *Forbes v. Hammond*, L. C. 15th Jan. 1811. Reg. Lib. A. 1810. fol. 178. a manager was appointed of a West India estate without giving security.

But in *Rutherford v. Wilkinson*, Rolls, 9th July, 1825, *ex relatione* Mr. Tinney, the Master of the Rolls said that that case was under special circumstances; and that in general by the report it should appear that no manager could be found who would give security, or that the proposed person was fit to be appointed without security; but, under the circumstances of that case, made the order with the consent of such of the parties as were capable of consenting.

(2) The manager of a West India estate is not entitled to commission during his absence from the island, but is entitled to what he has paid to others for the management of the estate during his absence, provided the payments are reasonable. *Forrest v. Elwes*, 2 Mer. 68.

No. VII.

ORDER FOR APPOINTMENT OF CONSIGNEE
AND DORMANT MANAGER. (1)

[*Inter alia*] And it is ordered, that it be referred to Mr. S. the Master to whom these causes stand transferred, to appoint a proper person in London, to whom the rents, profits, and produce of the said testator Mr. Bond's estate in Jamaica, may be consigned and committed. And the said Master is to make such person a reasonable allowance in respect thereof; but such person is first to give security, to be approved of by the said Master, to be answerable for what he shall receive (2) in respect of the said testator's estate in Jamaica, as this Court hath hereby directed and shall hereafter direct. And it is ordered, that such person do pass his accounts annually up to the 30th day of April in every year, before the said Master, to be included in the said Master's general report, and pay the balances which shall be reported due from him to the said Richard Robinson, until the further order of this Court. And it is ordered, that the said Master do appoint one or

more proper person or persons to act as manager or managers of the said testator's estate in Jamaica, in the event of the death, absence from the island, or other incapacity to act of the said Peter Robertson, the present manager, to receive the rents, profits, and produce thereof, and remit the same to the consignees or consignees for the time being in London. *Rutherford v. Wilkinson*, 31st May, 1823. Reg. Lib. B. 1822. fol. 1241.

For the like order, with direction for security. See S. C. M. R. 30th November, 1824. Reg. Lib. B. 1824. fol. 146.

For the like order without security, the plaintiff's counsel consenting. See S. C. M. R. 22d April, 1826. Reg. Lib. B. 1825. fol. 903.

NOTES.

(1) In *Forbes v. Hammond*, 1 J. & W. 88. the Master of the Rolls doubted whether a consignee could be appointed prospectively, in the event of the death of another; but made the order, observing, that it must again come before the Court upon the report.

And such orders have been since repeatedly made. *Rutherford v. Wilkinson*, *supra*.

(2) See No. VI. Note (1), *ante*.

No. VIII.

ORDER FOR RECEIVER AGAINST SEQUESTRA- TOR. — ACCOUNT OF INCUMBRANCES AND PRIORITIES.—RECEIVER TO KEEP DOWN IN- TEREST.

His Lordship doth order, that it be referred to Mr. T. one &c. to inquire what annuities or other incumbrances there are affecting the tithes, rents, issues, and profits of the rectory of Simpson and the vicarage of Little Missenden, in the county of Bucks, in the pleadings of this cause mentioned, and to state their priorities, and what is due thereon. And the said Master is to cause an advertisement to be published in the *London Gazette*, and such other public papers as he shall think proper, for all persons claiming annuities or other incumbrances affecting the tithes, rents, issues, and profits of the said rectory and vicarage to come in before him, and make out their claims; and he is to fix a peremptory day for

that purpose, and for the better recovery thereof. [See Usual Directions, No. I. *ante.*] And it is ordered, that it be referred to the said Master to appoint a proper person to be receiver of the tithes, rents, issues, and profits of the said rectory of Simpson and vicarage of Little Missenden, and to make him a reasonable allowance in respect thereof; such person so to be appointed first giving security &c. [See No. I. *ante.*] And it is ordered, that the respective holders of the said tithes, rents, issues, and profits now due, and which shall hereafter accrue due in respect thereof, do pay the same to such receiver. And it is ordered, that the said receiver do provide for the service of the said churches of Simpson and Little Missenden, and make and pay a proper allowance and remuneration to the persons serving the same. And it is ordered, that the said receiver do pay the said bishop his costs of this application, such costs to be taxed by the said Master in case the parties differ about the same; and he is to be allowed the same in passing his accounts before the said Master. And it is ordered, that the said receiver, in the next place, do pay and keep down the arrears and growing payments of the annuities and other incumbrances charged on the said tithes, rents, issues, and profits, according to their respective priorities. And it is ordered, that the said receiver do pass his accounts before the said Master, and pay the balances that shall be reported due from him, after paying such allowance and remuneration for the service of the said churches as aforesaid, and paying and keeping down the arrears and growing payments of the said annuities and other incumbrances, into the Bank, with the privy &c. [See Usual Directions, No. X. *ante.*] *Couraud v. Hanmer*, L. C. 26th July, 1823. Reg. Lib. A. 1822. fol. 2387.

The like order (except as to incumbrances) was made by the Lord Chancellor in *Littleboy v. Spooner*, on the same day. And see Orders in *Silver v. Bishop of Norwich*, 3 Swan. 117. note. *White v. Bishop of Peterborough*, 3 Swan. 118.

No. IX.

ORDER FOR RECEIVER OF HEIR LOOMS.

His Lordship doth order that the defendant, George Duke of Marlborough do, on or before the 11th day of April next, being the first seal before the next term, pay the sum of £—— into the Bank, with the privity &c. to be there placed to the credit of this cause, “the gold plate account,” subject to the further order of this Court. And in case the said sum of £—— shall not be paid into the Bank by the said defendant, the Duke of Marlborough, by the time aforesaid, then, but in that case only, it is ordered that it be referred to Mr. C. one &c. to whom this cause stands referred, to appoint a proper person or persons to have the care and custody of the several articles at Blenheim, particularly specified and set out in the inventory in the bill mentioned, and which are specifically bequeathed by the will and codicils of George, late Duke of Marlborough, upon the trusts therein contained. And the said Master is to make him or them a reasonable allowance, &c. [See No. I. *ante.*] such person or persons so to be appointed first giving security &c. [See No. I. *ante.*] to take due care of such several articles as aforesaid, and deliver up the same as this Court shall hereafter direct. And for the purpose aforesaid it is ordered, that the several articles so at Blenheim as aforesaid be delivered to such person or persons who shall be so appointed receiver or receivers as hereinbefore directed. *Earl of Shaftesbury v. Duke of Marlborough*, L. C. 28th March, 1820. Reg. Lib. A. 1819. fol. 792.

No. X.

DIRECTION IN DECREE FOR CONTINUING RECEIVER.(1)

And it is further ordered, that the receivers appointed in this cause be continued, and pass their accounts before the said Master; and that the several orders(2) directing the payment of the balances in the receivers' hands into the Bank,

from time to time upon passing their accounts be also continued. *Gibson v. Lord Montfort*, 25th June, 1750. Reg. Lib. A. 1749, fol. 583. S. C. 1 Ves. 485. Ambl. 93.

For direction for continuing consignee. See *Equity Draftsman*, 663.

NOTES.

(1) The appointment of a receiver made previously to a decree will be superseded by it, unless the receiver is expressly continued. *Gibson v. Lord Montfort*, *supra*.

So in the case of an injunction. See *Decrees respecting Injunctions*, No. X. *ante*.

(2) Since the general orders for receivers accounting [See No. I. Note (7), *ante*.] this direction has become unnecessary.

No. XI.

ORDER FOR PASSING ACCOUNTS OF DECEASED RECEIVER, AND APPOINTMENT OF NEW RECEIVER.

This Court doth order that the said Ann Burgess, the administratrix of James Giblett, deceased, the receiver appointed in this cause, do pass the accounts of the said James Giblett, as such receiver, before Mr. F. the Master to whom this cause stands transferred. And it is ordered, that the said Robert Burgess and Ann Burgess his wife, do pay what the said Master shall certify to be due from the said James Giblett on the balance of such account, into the Bank, with the privity &c. [See *Usual Directions*, No. X. *ante*.] And upon such payment being made, it is ordered that the recognizance entered into by the said James Giblett and John Feetham and Thomas Feetham, his sureties, be vacated (1); and for that purpose the proper officer is to attend the Right Honourable the Master of the Rolls with the record of the said recognizance. And it is ordered that it be referred to the said Master to appoint a proper person to be receiver of the tithes, rents,

issues, and profits of the said rectory of Elvetham, in the said county of Hants, in the pleadings of this cause mentioned, in the room and stead of the said James Giblett &c. [See No. VIII. *ante.*] Littleboy v. Spooner, V. C. 14th June, 1826. Reg. Lib. B. 1825. fol. 1516.

NOTE.

(1) See Discharge of Receiver, No. I. Note (4). *ante.*

ORDERS RESPECTING SOLICITORS.

No. I.

ORDER FOR DELIVERY AND TAXATION OF SOLICITOR'S BILL. (1)

It is ordered, that they (Messrs. T. M. and R. T.) do in a fortnight after notice hereof deliver (2) unto the petitioner a bill of all such fees and disbursements as they claim to be due to them in these and all other causes and matters wherein they have been concerned as the attorneys or solicitors of the petitioner. And it is ordered that it be referred to Mr. S. one &c. to tax such bill. And it is ordered that the said T. M. and R. T. and also the petitioner do produce before the said Master upon oath, as the said Master shall direct, all books, papers and writings in their custody or power respectively relating to such bill, or any of the items or charges therein, and be examined (3) upon interrogatories touching the same, or otherwise as the said Master shall direct. And it is ordered that the petitioner pursuant to his said submission (4), do pay to the said T. M. and R. T. what shall appear to be due to them on such taxation. And on payment thereof (5), or in case such bill shall appear to be already paid, it is ordered that the said T. M. and R. T. do deliver to the petitioner upon oath all deeds, books, papers and writings in their custody or power belonging to the petitioner. And if upon such taxation it shall appear that the said T. M. and R. T. are overpaid, it is ordered that they do refund (6) and repay unto the petitioner what shall appear to be so overpaid. And it is ordered, that all proceedings at law in respect of the said bill be stayed until after the said Master shall have made his report. Gard-

ner v. M. of Townshend, M. R. 31st January, 1815. Reg. Lib. B. 1814. fol. 207.

For like orders. See Hand's Pract. 242. 244. 247. Equity Draftsman, 612.

For like orders in the Exchequer. See 2 Fowl. 461. 274.

For order for enlarging time for delivery of bill. See Hand's Prac. 249.

For order for extending former order for taxation. See Hand's Prac. 250.

For order for reviving order for delivery and taxation &c. by executors of client. See Hand's Pract. 252.

For orders for payment of costs of taxation. See Hand's Prac. 254. 257. 2 Fowl. 465.

For Master's certificates of taxation. See Hand's Pract. 267. 268.

NOTES.

(1) Although bills have been filed by solicitors for their fees, it seems that there are no instances of decrees in such suits. See Barker v. Dacie, 6 Ves. 685. 687.

In Sayers v. Walond, 1 S. & S. 97. the Vice Chancellor refused to make an order for taxation on the petition of the solicitor. And see Beames on Costs, 293. But see Gilb. For. Rom. 207. Harr. 360.

(2) *Delivery of Bill.*

The delivery of the bill and taxation may be ordered at the same time. See Beames on Costs, 266. Gardner v. M. of Townshend, *supra*.

Otherwise at law. See Beames on Costs, *supra*. Tidd's Prac. 99.

(3) *Examination of Parties.*

The order for taxation usually authorizes the Master to examine the parties. Gardner v. M. of Townshend, *supra*. And see Beames on Costs, 283. Drapers' Company v. Davis, 2 Atk. 295. Wilson v. Williams, Barn. 263. Temple v. Horne, M. R. 30th Oct. 1746. Reg. Lib. B. 1746. fol. 5. Stapleton v. Scarlet, M. R. 19th Nov. 1747. Reg. Lib. B. 1747. fol. 14. Aubrey v. Popkin, No. III. *post*.

(4) *Submission to pay.*

Previously to the statute 2 Geo. II. c. 23. s. 23. it seems that in equity, as well as at law, the client could not compel taxation without bringing the amount of the bill into Court. See Beames on Costs, 258. But by that statute taxation is to be ordered upon a submission to pay what shall appear to be due, without any money being brought into Court.

(5) *Lien of Solicitor on Papers.*

In *Clutton v. Pardon*, Turn. 304. the Lord Chancellor refers to the terms of this part of the order, as proving the lien of the solicitor upon the papers of the client.

For the lien of the solicitor on papers. See Beames on Costs, 320. Tidd's Pract. 100.

(6) *Refunding.*

By the statute 2 Geo. 2. c. 23. s. 23. the overplus if any is to be refunded.

No. II.

ORDER FOR LEAVE TO FILE EXCEPTIONS TO
MASTER'S REPORT ON TAXATION OF COSTS.

Upon the humble petition of Thomas Skipp, this day preferred unto the Right Honourable the Lord High Chancellor &c. shewing (among other things) that by an order of the 9th day of June last, it was ordered that &c. That the said Master has taxed the said petitioner's said bill, but on such taxation has disallowed all the said several above-mentioned charges of &c. whereas the petitioner is advised that the said Master ought to have allowed all the said charges. That the said Master, on the 8th day of July inst. made his report on such taxation. It is ordered, that the said petitioner be at liberty to file exceptions to the said Master's said report, for his disallowance of the said several charges above-mentioned, to be comprised in the petitioner's said bill of costs; of which notice is forthwith to be given. *Skipp v. Harwood*, 9th July, 1748. Reg. Lib. B. 1747. fol. 391.

NOTE.

An exception does not lie to the Master's report as to costs; but

a petition should be presented, stating the particular items objected to, and praying for leave to except. *Pitt v. Mackreth*, 3 Bro. 321. And see *Holbecke v. Sylvester*, 6 Ves. 417. *Lucas v. Temple*, 9 Ves. 299. *Purcell v. Macnamara*, 12 Ves, 171. So in the Exchequer. *Jenkinson v. Royston*, 9 Price, 215.

The Court will not interfere in respect of mere *quantum*, but only upon the ground of irregularity, or that the Master has acted upon a mistaken principle. *Fenton v. Crickett*, 3 Mad. 496.

So in the case of receivers' accounts. See Decrees respecting Receivers, No. I. note (7), *ante*.

The application being in the nature of an appeal, the petitioner must pay the taxed costs into Court. *Ex parte Leigh*, 4 Mad. 394.

Where, in an original and supplemental suit, double term fees had been disallowed by the Master, leave was given to except. *Priestman v. Van*, V. C. 15th April, 1823. *Ex relatione Mr. Tinney*.

Where leave is given to except, it is not restricted in the items stated in the petition. S. C.

No. III.

ORDER FOR TAXATION OF BILL OF COSTS, AND SETTING ASIDE SECURITIES.

His Lordship doth order, that it be referred to Mr. P. one &c. to whom this cause stands referred, to tax the several bills of fees and disbursements delivered by the said Thomas Edwards, for business done for the petitioner and his said late brother, or either of them; and that the said Thomas Edwards do give credit therein for all sums of money paid to him by the petitioner, or his said late brother, or either of them, or on their or either of their account. And the petitioner and the said Thomas Edwards are to be examined (1) on interrogatories, and produce before the said Master upon oath, all books, papers, and writings, in their respective custody or power, relating to the matters in question, as the said Master shall direct; who is to make unto the parties all just allowances. And his Lordship doth declare, that the bond and mortgage before mentioned are to stand as a security only for what (if any thing) shall be found due to the said

Thomas Edwards on such taxation, (the petitioner submitting to pay what shall appear to be due to the said Thomas Edwards, in respect of the said bills). And it is further ordered, that the said Thomas Edwards be restrained from proceeding against the petitioner or his estate, upon the said bond or mortgage, or otherwise in respect of the said bills of costs, till after the Master shall have made his report. And his lordship doth reserve the question concerning interest on the said bond and mortgage, and all further directions, till after the Master shall have made his report. *Aubrey v. Popkin.* L. C. 22d Jan. 1768. Reg. Lib. A. 1767. fol. 78. S. C. 1 Dick. 403.

NOTE.

(1) See No. I. Note (3), *ante*.

DECREE &c. ON BILL OF INTERPLEADER.

No. I.

ORDER FOR INJUNCTION ON BILL OF INTERPLEADER. (1)

[The plaintiffs had sold to the defendants the Withers's, a quantity of resin, but retained the possession of it at their request. The Withers's afterwards sold it to Bromer, who before the delivery of it became bankrupt, upon which actions were commenced against the plaintiffs by the Withers's, and Campbell, Hodgson, and Mitchell, the assignees of Bromer. Blann was assignee under a deed of trust for the creditors of the Withers's.]

Whereupon and upon hearing Mr. A. of counsel for the defendant Charles Campbell, and the said affidavit, and an affidavit of notice of this motion to the other defendants read, and the plaintiff undertaking not to part with the twenty-nine-and-a-half tons of resin mentioned in the plaintiff's bill, until the further order of the Court, and also undertaking to give a notice of motion that the said twenty-nine-and-a-half tons of resin may be sold, and the proceeds thereof paid into Court, (2) His Lordship doth order that an injunction be awarded to restrain the defendants Thomas Withers, and Henry Brown Withers, Charles Campbell, and John Hodgson, and John Mitchell, from prosecuting the actions at law (3) commenced by them against the said plaintiffs, for or in respect of the twenty-nine-and-a-half tons of resin in the plaintiffs' bill mentioned, and also to restrain the said defendants, together with the defendant Edward Blann from commencing or prosecuting any further or other action or suit against the said plaintiffs, for or in respect of the said twenty-nine-and-a-half tons of resin, until the said defendants shall fully answer the plaintiffs'

bill, or (4) until the further order of this Court. *Lys v. Withers*, L. C. 1st July, 1813. Reg. Lib. B. 1812. fol. 896.

For like order. See *Hand's Pract.* 13.

NOTES.

(1) *Injunction on Bill of Interpleader.*

In *Croggon v. Symons*, 3 Mad. 130. it was said by the Vice-Chancellor that it was not the antient practice to grant an *ex parte* injunction on bills of interpleader. And see *Dungey v. Angove*, 3 Bro. 36. S. C. 2 Ves. jun. 311. And in *Croggon v. Symons*, *supra*, the Vice-Chancellor refused it.

But in *Warrington v. Wheatstone*, Jac. 205. the Lord Chancellor granted a special injunction, on a bill of interpleader, on payment of the money into Court. And see *Vicary v. Widger*, 1 Sim. 16. *Jones v. Gilham*, Coop. 49.

And in *Walbanke v. Sparks*, 1 Sim. 385. a special injunction was granted on payment of the money into Court, without an affidavit of the facts.

In the Exchequer, upon the certificate that the money is paid into Court, the injunction is granted of course. 1 Fowl. 296.

(2) By an order of the 14th of July 1813, the resin was directed to be sold, and the produce, deducting the expenses of sale, paid into Court, and the plaintiff was to be at liberty to apply for the expenses of warehouse-room. S. C. Reg. Lib. B. 1812. fol. 1075.

By an order of the 17th of November, 1813, the amount of charges for warehouse-room was ordered to be paid into Court without prejudice. S. C. Reg. Lib. B. 1813. fol. 55.

(3) See Decrees &c. respecting Injunctions, No. VII. note (2), *ante*.

(4) See Decrees &c. respecting Injunctions, No. XII. note (3), *ante*.

No. II.

DECREE ON BILL OF INTERPLEADER.

[For statement of case. See No. I. *ante*.]

This Court doth order that the parties do interplead; and for that purpose it is ordered that the defendants Thomas Withers and Henry Brown Withers, do proceed in the

DECREE &c. ON BILL OF

ORDER FOR INJUNCTION

[The plaintiffs had use, as, with the £—— cash in of resin, but retain will raise what shall be taxed for Withers's afterw [See Usual Directions, No. XIV. became bankrupt] it is ordered that what shall be taxed plaintiffs by 'dis' costs, be paid to Mr. W. G. B. their solici- assignees the cred: and for the purposes aforesaid, the said Accountant- W is to draw &c. And this Court doth reserve the fer consideration of the rest of the costs of this suit, and of all further directions, (3) until after the trial of the said action. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. ante.] Lys v. Withers, C. 25th April, 1815. Reg. Lib. B. 1814. fol. 961

NOTES.

(1) Decree on Bill of Interpleader.

The Court disposes of the questions arising upon bills of interpleader in various modes, according to the nature of the question, and the manner in which it is brought before the Court. If at the hearing the question between the defendants is ripe for decision, the Court decides it; and if it is not ripe for decision, directs an action or an issue, or a reference to the Master, as may be best suited to the nature of the case. See *Angell v. Hadden*, 16 Ves. 203.

Sometimes it directs that an action already commenced may be proceeded in. *Lys v. Withers, supra*. And see *Aldridge v. Mesner*, 6 Ves. 418.

Sometimes a decretal order is made upon the motion for an injunction. *Aldridge v. Mesner, supra*.

Boylston, 2 Ves. jun. 108. the Lord Chancellor
that a bill of interpleader was never brought

interpleader, where one of defendants makes
post.

plaintiff.

the fund, if the suit is properly
costs, 37. Campbell v. Solomans,
Gilham, Coop. 56.

Compel the defendants to interplead is not dis-
that the plaintiff may obtain his costs on motion. See
am, Coop. 49. And see Further Directions, Note (3),
but where the right is disputed, costs will not be given to the
plaintiff before the hearing. Jones v. Gilham, *supra*.

(3) Further Directions.

In Anon. 1 Vern. 352. it was declared by the Court, that a cause
having been heard upon a bill of interpleader, and a trial at law
directed to settle the right between the defendants, there was an end
of the suit as to the plaintiff; so that if he afterwards died, the cause
should still proceed; and that there was no need of revivor, each
defendant being in the nature of a plaintiff.

A decretal order having been made on the motion for an injunction,
the plaintiff was allowed his costs on motion. Aldridge v. Mesner,
6 Ves. 418.

Costs of Suit.

On further directions the Court will order the defendants by whom
the suit has been occasioned, to pay the costs of the plaintiff and
other defendants. Dowson v. Hardcastle, 2 Cox, 278. Cowtan v.
Williams, 9 Ves. 108. and cases referred to in note.

In Edensor v. Roberts, 2 Cox, 281. the plaintiff was ordered to
pay the costs of some of the defendants, and to be repaid them by
the others. But see the Q. of the reporter as to this.

Bill of Interpleader.
of this Court. Lrs.
P 1-12

DECREEES FOR ISSUE, CASE, &c.

No. I.

DECREE FOR ISSUE ON MODUS.

It is ordered that the parties do proceed to a trial at law (1) the next Summer assizes twelve months (2), to be holden for the county of Leicester, upon the following issue (3): Whether from time whereof the memory of man is not to the contrary, there has been paid and payable, by the farmers or occupiers of the yard-lands within the said parish, to the rector of the said parish for the time being, yearly, a modus of 5s. per annum for every yard-land, in lieu and satisfaction of all small tithes arising and renewing upon such yard-lands respectively. And the plaintiff here is to be plaintiff at law; and the said defendants are forthwith to name an attorney to accept a declaration, appear, and plead to issue. And it is hereby referred to the said Master to settle the said issue, in case the parties differ about the same. And it is ordered and decreed, that all books, papers, and writings, in the custody or power of any of the parties relating to the matters in question be produced (4) before the said Master upon oath, on or before the last day of Michaelmas term next; and any of the parties are to be at liberty to inspect the same, and to take copies thereof or of such parts thereof as they shall think fit, at their own expense; and such of the said books, papers, and writings are to be produced at such trial, as either party shall give notice of for that purpose. And his Lordship doth reserve the consideration of costs, and of all further directions (5), until after the said trial shall be had. And any of the parties are to be at liberty to apply &c. [See Usual Di-

rections, No. XIX. *ante*.] *Carte v. Hodgkin*, L. C. 20th May, 1748. Reg. Lib. A. 1747. fol. 628.

For order for issue to try partnership. See *Troutbeck v. Crew*, 2 Turn. Pract. 180.

For order for issue to try bankruptcy. See *Equity Draftsman*, 631.

For form of issue made up for trial. See 2 Turn. Pract. 181.

For judge's certificate of trial of issue. See *Rawson v. Ramsden*, 2 Turn. Pract. 80.

NOTES.

(1) *In what Court.*

The plaintiff in the issue must elect to have it tried either in the King's Bench or Common Pleas. If there is any special reason for having it tried in the Court of Exchequer, a special motion should be made for that purpose. *Antrobus v. East India Company*, 5 Mad. 3.

The Court of Exchequer always endeavours to have issues directed by it, sitting as a court of equity, tried at the bar of the Court of Exchequer, sitting as a court of common law. *Webb v. Rorke*, 2 Sch. & Lefr. 667.

Special Jury.

After the issue is made up, a motion should be made for a special jury, if necessary. *Anon.* 2 P. W. 68. *Attorney-General v. Snow*, there cited.

In the Exchequer an application for a special jury is nearly of course. *Stuart v. Greenhall*, 9 Price, 480.

A trial at bar should be directed to be by a special jury. *Baker v. Hart*, No. II. *post*. And see *Tidd's Pract.* 791. 825.

Venue.

The Court sometimes directs the issue to be tried in a particular county. *Chapman v. Smith*, 2 Ves. 516. *Grascomb v. Jefferies*, there cited.

In *Sparke v. Ivatt*, 1 S. & S. 366. the Vice-Chancellor held that an order to that effect could not be made part of the decree without consent, because the propriety of it depended upon circumstances which were extrinsic to the pleadings and proofs, but that a petition must be presented for the purpose of obtaining it. But see *Chapman v. Smith*, *supra*.

*Decrees for Issue, Case, &c.**(2) Default.**By Plaintiff.*

In the Exchequer the plaintiff in the issue may make default at one assizes. *Mitchell v. Rabbetts*, cited 1 J. & W. 226. And in Chancery it seems that formerly notice of trial might be countermanded. See *Anon.* 2 P. W. 68. But it seems that this is not now the rule in Chancery. See *Bearblock v. Tyler*, 1 J. & W. 226. Nevertheless, under special circumstances, leave will be given to postpone the trial. S. C. Delay being apprehended on the part of the plaintiff, the Court of King's Bench will permit the defendant to carry down the record by proviso. *Humpage v. Rowley*, 4 T. R. 767. In *Anon.* 4 Mad. 255. the issue not having been tried as directed, nor any notice of trial given, an order was made that the plaintiff should try the issue at the next assizes, or that it should be taken *pro confesso*.

For order *nisi* to take issues *pro confesso*. See *Equity Draftsman*, 617.

In *Drake v. Smith*, 6 Price, 100. a similar application was refused by the Court of Exchequer as premature; and the course was said to be, upon default, to move to take the issue *pro confesso*.

By Defendant.

In *Gardiner v. Rowe*, 4 Mad. 236. it is said to have been held, that the Court had no power to compel the defendant to proceed on an issue. But in *Wilson v. Ginger*, 2 Dick. 521. a defendant neglecting to name an attorney, for the purpose of trying the issue, was directed to do it in four days, or the issue to be taken as tried, and a verdict for the plaintiff. And the like order was made in *Constable v. Angel*, *Ib.* note. The cause may be set down for further directions, and to have the issue taken *pro confesso*. *Anon.* 1 Newl. Pract. 352. note.

(3) Form of the Issue.

The form of the issue is the same with that of an *assumpsit* upon a wager. See 2 Chitty on Pleading, 116. Turn. Pract. 449. 2 Turn. Pract. 181.

(4) Production of Papers.

Upon a trial directed by the Court, the parties will be directed to produce at the trial all documents which the Court may think necessary for a complete investigation. See *Marsh v. Sibbald*, 2 V.

& B. 375. The order for production will be made upon a defendant although he declines to become a party to the issue. *Pindar v. Smith*, 6 Mad. 48. But it will not be extended to documents held by him in a distinct character. S. C. The defendants in a tithe suit were ordered to produce at the trial of an issue, and before the Master, deeds produced by them at the hearing, though belonging to their landlord, who was not a party, or to admit at the trial the facts which the deeds were produced at the hearing to prove. *Pulley v. Hilton*, 10 Price, 118. Where documents and other evidence have been produced and read by either party at the hearing which he afterwards refuses to produce at the trial in evidence for the opposite party, a new trial will be granted, *toties quoties*. S. C. And see *Cooke v. Marsh*, 18 Ves. 210.

(5) Further Directions.

Before the trial of the issue, the plaintiff may dismiss his bill with costs upon motion. *Carrington v. Holly*, 1 Dick. 280. S. C. cited 2 Dick. 612.

But after the trial of the issue, and a verdict found for the defendant, the defendant is entitled to have the cause set down for further directions, in order that the dismissal may be pleadable. S. C.

Costs.

That the costs of an issue are discretionary, but that they generally follow the event, as at law. See *Beames on Costs*, p. 234.

No. II.

DIRECTION FOR TRIAL AT BAR.

His Lordship doth order that the parties do proceed to a trial at law at the bar of the Court of Common Pleas in Middlesex, some time in the next Michaelmas term, or at the sittings after next term, or at such other time as the Lord Chief Justice of that court shall think fit to appoint, upon the following issues, viz. &c. *Baker v. Hart*, L. C. 5th May, 1746. Reg. Lib. A. 1745. fol. 408. and Recital of Order. S. C. L. C. 5th July, 1746. Reg. Lib. A. 1745. fol. 539. S. C. 3 Atk. 542. 1 Ves. 28.

For order for trial at bar. See *Equity Draftsman*, 630.

NOTE.

In Anon. 2 Mad. P. & P. 478. note, it is said, that the Court seldom or ever directs a trial at bar, but only intimates that it would be desirable. But a trial at bar will be directed, the plaintiff consenting to accept *nisi prius* costs, in case the verdict should be in his favour. *Baker v. Hart, supra.* *Hite v. Salter*, 2 Dick. 495. S. C. 7 Bro. P. C. 214.

As to granting a new trial after a trial at bar. See *Regina v. Ball. de Bewdley*, 1 P. W. 212. *Richards v. Symes*, 2 Atk. 320. *Baker v. Hart, supra.*

No. III.

DIRECTION FOR EXAMINATION OF PARTIES.

And it is ordered, that either party be at liberty to examine the plaintiffs Thomas Crow and Samuel Whiting, and the defendant Henry Pitham, or any or either of them, as witnesses, or a witness at such trial. *Crawley v. Roberts*, V. C. 1st March, 1815. Reg. Lib. A. 1814. fol. 584.

NOTE.

In *Howard v. Braithwaite*, 1 V & B. 374. the Lord Chancellor, in directing an issue, refused to insert a direction for liberty to either party to examine the other, without consent. But in *Gardiner v. Rowe*, 4 Mad. 236. the Vice-Chancellor, upon the authority of *Harwood v. Harwood*, there cited, made an order for the examination of the plaintiff and of one of the defendants, without consent. And in *Detastet v. Bordenave*, Jac. 520. an order for the examination of the plaintiff and defendant, without consent, was held by the Master of the Rolls to be regular.

That such orders are common in bankruptcy. See S. C.

When the Court directs a party to be examined as a witness, no objection is waived, except that which arises from his being a party in the cause. *Rogerson v. Whittington*, 1 Swan. 40.

No. IV.

DIRECTION FOR READING DEPOSITIONS.

It is ordered, that the parties be at liberty to read the depositions taken in this cause of such of the witnesses as

upon such trial shall be proved to be dead, or unable to attend to be examined. *Crawley v. Roberts*, V. C. 1st March, 1815. Reg. Lib. A. 1814. fol. 584.

NOTE.

In *Jones v. Jones*, 1 Cox, 184. on a motion for leave to read the deposition of a witness in the cause, on a trial directed by the Court, on the ground of his age and inability to attend, the Lord Chancellor thought that the application should be made to the judge at the trial, and refused to make any order, as (it is there said) he had frequently done before. But in *Palmer v. Lord Aylesbury*, 15 Ves. 176. an order was made by the Lord Chancellor that the depositions of such of the witnesses as should be dead, or should be proved at the trial to be in such a state of health as to be incapable of attending, should be read. And in *Bellingham v. Pearson*, 1 V. & B. 339. note. *Wray v. May*, *Ib.* like orders were made. And in *Corbet v. Corbet*, 1 V. & B. 335. the Lord Chancellor ordered, that the depositions of witnesses, who were proved to be incapable of attending at the trial without great hazard should be read, and of such other persons as should be proved at the trial to be dead, or unable to attend; but leave was given to examine the witnesses on interrogatories in the mean time. Such depositions might be read without an order, upon proof of the death or inability of the witness to attend; but in that case the whole record of the proceedings must be proved. See *Palmer v. Lord Aylesbury*, 15 Ves. 177. *Corbet v. Corbet*, 1 V. & B. 336. *Gordon v. Gordon*, 1 Swan. 170. Depositions *de bene esse* (being taken before issue joined) cannot be read without an order. *Gordon v. Gordon*, 1 Swan. 166. S. C. 1 Wils. 155. And see *Price v. Bridgman*, 1 Dick. 144.

No. V.

DIRECTION FOR INDORSEMENT ON POSTEA.

And if the jury shall find any special matter, the same is to be indorsed on the postea. *Crawley v. Roberts*, V. C. 1st March, 1815. Reg. Lib. A. 1814. fol. 584.

For like direction. See 2 Turn. Pract. 181. Equity Draftsman, 631.

NOTE.

It is the habit of the Court, in ordering an issue, to direct, that, if the substance of the issue is found, but with some special circumstances which may be material in measuring the extent of relief to be given on further directions, that matter should be indorsed on the *postea*. See *White v. Lisle*, 3 Swan. 345.

No. VI.

DECREE.—ISSUE DEVISAVIT VEL NON.

His Lordship doth order, that the parties do proceed to a trial at law, at the sittings of the Court of King's Bench, in London, in the next term, or at such other time as the Lord Chief Justice of that Court shall appoint, upon the following issue, viz. *devisavit vel non*. And that the plaintiff Samuel Fenwick be plaintiff at law &c. [See No. I. *ante*.] And to the end the merits may come in question upon such trial, it is further ordered, that it be admitted (1) on both sides that the said Nathan James was seised in fee of the estate in question. And the plaintiff Samuel Fenwick and the defendant William James are to produce before the said Master, upon oath, all wills and drafts of wills that were at any time made by, or prepared for the said Nathan James, and all other deeds, papers, and writings &c. [See No. I. *ante*.] And his Lordship doth reserve the consideration of costs, and of all further directions, until after &c. [See No. I. *ante*.] And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante*.] *Fenwick v. James*, L. C. 29th January, 1748. Reg. Lib. A. 1747. fol. 193.

NOTE.

(1) The Court will direct the parties to make such admissions as are necessary to raise the questions to be determined. *Fenwick v. James*, *supra*.

No. VII.

ORDER FOR ISSUE AS TO CLAUSE IN WILL.

His Lordship doth order, that the parties do proceed to a trial at law at the next assizes to be holden for the county of Somerset, on the following issues: First, whether Thomas Horner, late of Mills Park, in the county of Somerset, Esq. deceased, did, in and by a certain paper writing, bearing date the 15th day of January, in the year of our Lord 1804, purporting to be a codicil to the last will and testament of the said Thomas Horner, devise in manner and form following, that is to say &c. (stating so much of the codicil as was not disputed): 2dly. Whether the said Thomas Horner having in and by his will, bearing date the 29th day of November, 1800, from and after &c. devised &c. did by his said codicil devise in manner and form following, that is to say &c. (stating so much of the codicil as was disputed.) And the defendant Thomas Strangways Horner is to be plaintiff at law &c. [See No. I. *ante.*] And his Lordship doth reserve the consideration of all further directions, and of the costs of this suit, until after the trial shall have been had. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Hippesley v. Horner*, L. C. 12th May, 1804. Reg. Lib. A. 1803. fol. 1075.

NOTE.

See *Earl of Newburgh v. Countess of Newburgh*, 5 Mad. 364.

No. VIII.

DECREE ON FURTHER DIRECTIONS IN SAME CASE.

His Lordship doth declare, that it appears by the finding of the jury, that the part of the codicil of the said testator Thomas Horner, whereby he expressed himself as follows &c. does not constitute the will of the said testator; and that the part of the codicil of the said testator Thomas Horner,

whereby he expressed himself as follows &c. doth constitute the will of the said testator Thomas Horner; and that one part of the said codicil constituting, and another part thereof not constituting, the will of the said testator, this Court cannot order the same to be given up. But it being consonant to equity, that the parties should stand in such a situation as if the said codicil could be delivered up, this Court doth declare, that so much of the said codicil as does not constitute the will of the said testator, is void; and that the devise to the heirs of the body of the said testator Thomas Horner, contained in his said codicil, ought not to take effect; and doth decree the same accordingly; and doth also decree that the said defendant Thomas Strangways Horner be restrained from setting up any title at law to the several estates so devised to the heirs of the body of the said testator Thomas Horner, contained in the said codicil, and in question in these causes. *Hippesley v. Horner*, L. C. 17th May, 1805. Reg. Lib. A. 1804. fol. 1237.

No. IX.

ORDER FOR NEW TRIAL OF ISSUE.

Whereas by an order made in this cause bearing date the 7th day of December, 1813, it was ordered that the parties should proceed to a trial at law &c. [See No. I. *ante*.] In pursuance of which order the parties proceeded to trial of the second issue mentioned in the said order, when the jury found a verdict for the plaintiff. And whereas Mr. D. &c. of counsel for the defendant Charles Dickenson, this day moved and offered divers reasons unto the Right Honourable &c. that a new trial might be had of the said issue, in the presence of Sir A. P. &c. of counsel for the plaintiff, Mr. W. of counsel for the defendants Thomas Watmore and James Watmore, who consented thereto. Whereupon and upon hearing an affidavit of R. C. &c. read, his Honour doth order that upon the defendant Charles Dickenson paying unto the plaintiff his costs of the former trial, to be taxed by Mr. A one &c. in

case the parties differ, the parties do forthwith proceed to a new trial of the second issue directed in this cause, by the order bearing date the 7th day of December, 1813, in the manner directed by the said order. *Watmore v. Watmore*, M. R. 14th February, 1815. Reg. Lib. B. 1814. fol. 304.

NOTE.

For new trial after trial at bar. See No. II. Note, *ante*.

No. X.

DECREE ON FURTHER DIRECTIONS AFTER
TRIAL OF ISSUE.

[The bill was for the discovery of a lease granted by a former owner of the manor, under whom the plaintiff claimed, to those under whom the defendant claimed, for lives, charging that the lives had expired. Upon the original hearing an issue was directed, which was found for the plaintiff.]

His Lordship doth think fit, and so order and decree that the said defendant do deliver possession of the lands mentioned in the said issue found for the plaintiff to the plaintiff, and that the plaintiff be quieted in the possession thereof, against the said defendant, and all persons claiming under him. And that the said defendant do come to an account before the said Master, for the rents and profits of the said premises accrued since the 5th of November, 1728, the day on which the said last life in the said lease died, which have been received by the said defendant, or by any other person &c. For the better clearing of which account &c. [See Usual Directions, No. II. *ante*.] And it is ordered and decreed that the said defendant do pay unto the plaintiff what shall be found due to him on the balance of the said account; and that the said defendant do pay unto the plaintiff his costs, both at law and in this Court, to be taxed by the said Master. *Edwin v. Morris*, L. C. 31st January, 1747. Reg. Lib. A. 1746. fol. 217.

No. XI.

DECREE ON FURTHER DIRECTIONS, AFTER ISSUE ON BILL BY LORD OF A MANOR, ESTABLISHING HIS RIGHT TO A FINE.

His Lordship saw no cause to give the plaintiffs in the cross cause any relief; and doth therefore order, that the matter of the said cross bill do stand dismissed out of this court, with costs to be taxed by the said Master. And in the original cause his Lordship declared that a general fine was and is due and payable from the said defendants, the tenants, and all other the tenants of customary tenements, called tenant-right estates respectively, within the said honours, boroughs, and manor of Cockermouth &c. unto the plaintiff the Duke of Somerset, as the next admitting lord, after the death of the late Duchess of Somerset, his wife, according to the verdict found upon the said trial so directed. And doth therefore order and decree, that such the said Duke of Somerset's right to the said general fines be established. And it now appearing by the answer of the defendants, the tenants, to the said original bill, and also by the said cross bill of the said tenants, that several other of the plaintiff, the Duke of Somerset's tenants of tenant-right estates within the said honours, boroughs, and manors were concerned in the defence of the said original bill, and exhibiting the cross bill, and agreed to join in the expense thereof, his Lordship doth therefore order, that it be referred to the said Master to examine into the matter; and for that purpose that the articles mentioned in the said answer be produced before him by the defendants, the tenants, their agents and solicitors, and that they be examined on interrogatories concerning the same; and that whoever subscribed the said articles to carry on the suits shall, as between the plaintiff in the original cause, and the defendants the tenants, be considered in the original cause as defendants, and in the cross cause as plaintiffs, and be subject to pay the costs in like manner as the other defendants to the original bill; and that the defendants,

the tenants, do pay the costs in the original cause, both at law and in this court, to be taxed by the said Master. And as to the said fines, the plaintiff in the original bill having thereby waived the benefit of the forfeiture, his Lordship doth order and decree, that the defendants and the other tenants of such tenant-right estates within the said honours, manors, and boroughs, do pay their fines for their several tenements, according to their fines assessed by the plaintiffs' stewards or commissioners in open court. And if any particular tenant shall think the fine imposed on his tenement to be excessive, and do certify the same under his hand to the registrar of this court, before the 1st day of March next, and desires to try the same, that then the plaintiff, the Duke of Somerset, shall be discharged from his consent to waive the forfeiture as to such tenement, and be at liberty to bring his ejectment for the forfeiture, or other action for the said fines, as he shall be advised; to which action such particular tenant shall forthwith appear, and take a declaration, and try it the next assizes in Cumberland, or at bar, either by a common or special jury, as the Court upon motion shall direct. And on that trial the Duke of Somerset's right to a general fine shall be admitted; and the question at such trial is only to be, whether such fine be reasonable or unreasonable. And as to the defendant, the Earl of Hertford, the said original is to stand dismissed without costs. And the said Master is to tax the said Earl of Hertford his costs in the cross cause to be paid by the plaintiffs therein. Duke of Somerset v. France, L. C. 11th December 1725. Reg. Lib. A. 1725. fol. 40. S. C. 1 Strange, 654. Fortesc. 41. (Duke of Somerset v. Fream), 6 Vin. 109.

No. XII.

DECREE.—CASE.

[The devise by the codicil was to trustees and their heirs, in trust for the defendant Millington Buckley, at twenty-one years, for life, and in the mean time the rents and profits were directed to be applied in payment of debts and legacies. By the will, the same estates had been devised to charitable uses.]

His Lordship doth order that a case be made upon the said testator's will and codicils, and the Act of Parliament to prevent the disposition of lands, whereby the same become unalienable, for the opinion of the judges of the Court of King's Bench; and that the same be settled by the said Master, in case the parties differ about the same. And upon the case so stated, it is further ordered, that the question be, whether the said testator's real estate in Stretton and Shrewsbury be well devised by the said codicil, dated the 17th day of March, 1736, to the defendant Millington Buckley for life, with remainders over to his first and every sons in tail male, the said Millington Buckley having attained his age of 21 years. And the judges of the Court of King's Bench are to be attended with the said case. And his Lordship doth reserve the consideration of all further directions until after the judges shall have made their certificate; and thereupon such further order shall be made as shall be just. *Attorney-General v. Lloyd*, L. C. 1st August, 1747. Reg. Lib. A. 1746. fol. 689.

For judge's certificate upon a case. See 2 Turn. Pract. 79.

NOTE.

When a case is directed, the Court sometimes refers it to the Master to settle it. *Ceal v. Ashurst*, 2 Dick. 474. and orders there referred to. At other times the facts to be stated are stated by the Court in the order. *Ashburnham v. Kirkall*, 1 Dick. 73. *Harman v. Spottiswood*, there cited. And see Decree in *Prebble v. Boghurst*, 1 Swan. 313. note. The usual direction is that it should be settled by the Master in case the parties differ. *Attorney-General v. Lloyd*, *supra*. *Prebble v. Boghurst*, *supra*. *Vawser v. Jeffery*, 2 Swan. 275.

For Master's certificate of having settled the case. See 2 Turner's Prac. 78.

The case should not state a speculative question, but the fact by which the question is raised. *Bliss v. Collins*, 1 J. & W. 427.

A case upon the construction of a will as to equitable estates should state the devises as legal ones. *Houston v. Hughes*, 6 B. & C. 413. 421. And see Questions put to the Judges by the House of Lords. *Thellusson v. Woodford*, 11 Ves. 132.

By the rules of the King's Bench the signature of counsel on both sides is required. *Bliss v. Collins*, 1 J. & W. 426. If the counsel will not sign it, they are understood to waive the benefit of it. S. C. Ib. 427. The defendant was ordered to procure the signature of his counsel to a case, or to shew cause to the contrary. S. C. Ib. 428.

For mode of proceeding upon a case at law. See 1 Newl. Prac. 355.

No. XIII.

ORDER TO AMEND CASE.

His Lordship doth order that the case whereupon the judges of the Court of King's Bench have certified their opinion be amended by introducing therein a statement of the facts that &c. and by inserting therein the following extract from the will of Richard Lowe, the testator in the said case named, that is to say &c. And it is ordered that the said case when so amended be referred back to the said judges for their opinion, whether the facts so introduced are admissible in evidence in the said case, and if so, whether on the case so amended as aforesaid they are of the same opinion as before certified by them, or how otherwise. And his Lordship doth reserve the consideration of all further directions until after the judges shall have made their certificate. And any of the parties are to be at liberty to apply to this Court as they shall be advised. *Lowe v. Manners*, L. C. 1st November, 1822. Reg Lib. B. 1821. fol. 2041.

No. XIV.

DECREE DIRECTING ACTION.

His Lordship doth order, that the parties do proceed to a trial at law, at the next summer assizes to be holden for the county of Somerset, upon the ejectment already brought, or on any new ejectment to be brought by the defendants, or either of them, for the premises in question. And it is further ordered, that all copies of Court rolls, deeds, and writings, which are in the custody or power of any of the parties, relating to the premises in question, be produced &c. [See No. I. *ante.*] And it is further ordered, that the injunction granted in this cause be continued, so far as to restrain the defendants from taking possession in the mean time. And his Lordship doth reserve the consideration of costs, and of all further directions, until after such trial shall be had, when any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Sheppard v. Dyer*, L. C. 8th December, 1746. Reg. Lib. B. 1746. fol. 141.

For order for ejectment. See Equity Draftsman, 631.

For order for action of trover. See Equity Draftsman, 631.

NOTE.

In an action brought under the direction of the Court, the like order will be made as to reading depositions as in the case of an issue. See Direction for reading Depositions, No. IV. *ante.*

No. XV.

DECREE RETAINING BILL, WITH LIBERTY TO BRING ACTION.

His Honour doth order, that the plaintiff's bill be retained for twelve months, with liberty for the plaintiff, in the mean time, to proceed at law touching the matter in question in this cause, as he shall be advised. But in case the plaintiff shall not proceed at law, and proceed to trial within the time aforesaid, the plaintiff's bill is from thenceforth to stand dis-

missed out of this Court with costs, to be taxed by Mr. P. one &c. But in case the plaintiff shall proceed at law, and to trial as aforesaid, within the time aforesaid, his Honour doth reserve the consideration of the costs of this suit, and of all further directions, until after such trial shall be had. And in either case, any of the parties are to be at liberty to apply to the Court, as they shall be advised. *Cator v. Dewar*, M. R. 2d December, 1779. Reg. Lib. A. 1779. fol. 683. S. C. 2 Dick. 654. where, however, the decree is not correctly stated.

For like order. See *Equity Draftsman*, 632.

NOTE.

Formerly further directions were reserved, whether any action was prosecuted within the time limited or not. See *Stevens v. Praed*, 2 Cox, 376. *Cole v. Dyer*, Appendix (1).

But afterwards further directions were only reserved in the event of the trial taking place. *Cator v. Dewar*, *supra*. *Stevens v. Praed*, *supra*.

Upon default a further order must be obtained, unless the decree expressly directs that, upon default, the bill should be dismissed without further order. See *Cator v. Dewar*, *supra*. *Stevens v. Praed*, 2 Cox, 374.

Otherwise where a cause is ordered to stand over for want of parties. See *Decrees for Cause to stand over, &c.* No. I. *post*.

In *Cator v. Dewar*, *supra*, it was held, that a further order could not be obtained on motion, but that the cause must be set down for further directions. But in *Stevens v. Praed*, 2 Cox, 374. it was held, that it might be obtained on motion also.

In *Duke of Leeds v. Corporation of New Radnor*, 2 Bro. 519. it was said that the Court, by retaining the bill, admitted the plaintiff's right to relief. But in *Curtis v. Curtis*, 2 Bro. 629. the Master of the Rolls was inclined to think that the retaining a bill was not in itself a determination that relief in equity must ultimately be given. And in *Harwood v. Oglander*, 6 Ves. 225. the Master of the Rolls held, that it was not a necessary consequence that the Court would not ultimately determine against the plaintiffs, because the bill had been retained; and that it had been so determined by Lord Kenyon in *Barber v. Geast*. S. C. (*Geash v. Barber*), 2 Bro. 61.

That in bankruptcy, after order for petition to stand over until after trial at law, petition for further directions is not necessary. See *Ex parte Window*, 2 G. & J. 280.

APPENDIX (1).

Decree retaining Bill.

His Lordship doth order, that the plaintiff's bill be retained for twelve months ; and the plaintiffs be at liberty to bring an ejectment and proceed to trial thereon in the mean time. And his Lordship doth reserve the consideration of costs, and of all further directions, until after such trial shall be had ; and if no such trial shall be had, until after such time shall be expired. And any of the parties are to be at liberty to apply to the Court after such trial shall be had, or such time shall be expired. *Cole v. Dyer*, L. C. 27th Janaary, 1747. Reg. Lib. A. 1746. fol. 631.

DECREE FOR CAUSE TO STAND OVER, &c.

No. I.

ORDER FOR CAUSE TO STAND OVER, WITH LIBERTY TO ADD PARTIES.

This cause coming this present day to be heard and debated before the Right Honourable the Master &c. in the presence of counsel learned on both sides; and the pleadings in the cause being opened (1), and it appearing that the plaintiffs had not all proper parties before this Court. Whereupon and upon debate of the matter, and hearing the answer, &c. and what was alleged &c. his Honour doth order that this cause do stand adjourned over. (2) And the plaintiffs are to be at liberty to amend their bill by adding proper parties, and bring on their cause again to a hearing, as they shall be advised; but the plaintiffs are to pay unto the defendants the costs of the day. (3) *Ryal v. Billers*, M. R. 11th December, 1747. Reg. Lib. B. 1747. fol. 180.

For like orders. See Hand's Pract. 117, 118.

NOTES.

(1) *Mode of taking Objection.*

In *Darwent v. Walton*, 2 Atk. 510. it is said, that the objection for want of parties is in the nature of a plea of abatement at law, which cannot be resorted to after the merits have been gone into. And, regularly, the objection for want of parties ought to be taken on the opening of the proceedings, and before the merits are disclosed. *Jones v. Jones*, 3 Atk. 111.

Decree for Cause to stand over, &c.

But it frequently happens, that after a cause is gone into, and even thoroughly heard, yet the Court is compelled to let it stand over for want of parties. S. C.

In *East India Company v. Boddam*, 9 Ves. 467. it seems to have been thought that the objection could not be taken upon a rehearing. But in *Holdsworth v. Holdsworth*, 2 Dick. 799. upon a rehearing, the cause was ordered to stand over for want of parties. And see *Magdalen College v. Sibthorp*, 1 Russ. 154.

The objection cannot be taken by the plaintiff unless under special circumstances. *James v. Jackson*, 16 Ves. 361.

(2) Decree.

Formerly, upon a defect of parties, it was considered to be discretionary in the Court, either to dismiss the bill without prejudice to another bill, or to give leave to amend, on payment of the costs of the day. See *Stafford v. City of London*, 1 P. W. 429. But a decree of Sir Joseph Jekyl, dismissing a bill for want of parties, was reversed by Lord King on appeal. See *Anon.* 2 Atk. 15. *Jones v. Jones*, 3 Atk. 111. And a decree of the same nature in the Court of Exchequer was reversed likewise in the House of Lords. See *Anon.* 2 Atk. 15. *Green v. Poole*, 4 Bro. P. C. 122. And since that time causes are only ordered to stand over, on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties. *Jones v. Jones*, *supra*. *Hill v. Kirwan*, Jac. 164. And see *Windsor v. Windsor*, 2 Dick. 707. *East India Company v. Neave*, 5 Ves. 185. Lord Redesdale, p. 263. But this order is considered as made by consent, and therefore cannot be appealed from. See *Beresford v. Adair*, 2 Cox, 156. If the plaintiff is dissatisfied with the opinion of the Court as to the want of parties, he should let his bill be dismissed, and appeal from the order of dismissal. S. C. Sometimes the cause is ordered to stand over, with liberty to file a supplemental bill to add parties. *Jones v. Jones*, 3 Atk. 112. S. C. 1 Dick. 96. *Holdsworth v. Holdsworth*, 2 Dick. 799.

Sometimes leave is given to add parties, either by amendment or supplemental bill. *Canning v. Canning*, Appendix (1).

In *Pitt v. Brewster*, 1 Dick. 37. one of the executors of the testator, not being made a party, was ordered to be introduced into the decree as a party, and to account, without putting off the cause to add parties.

So where the personal representative of a person not a party to

the suit, is interested in proceedings before the Master, liberty will be given to bring him before the Master, without making him a party. Lord Redesdale, 145.

(3) Costs of the Day.

In *Mitchell v. Bailey*, 3 Mad. 61. the Vice Chancellor refused the costs of the day, the objection for want of parties not being stated by the answer. But in *Hill v. Kirwan*, Jac. 163. the Master of the Rolls gave the costs notwithstanding the above circumstance.

By Lord Lyndhurst's orders, 34. 2 Russ. (Appendix), 14. it is ordered that when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is therefore struck out of the paper, if the same cause is again set down, the defendant or defendants shall be allowed the taxed costs, occasioned by the first setting down, although he or they do not obtain the 'costs of the suit.

By Lord Lyndhurst's orders, 35. 2 Russ. (Appendix), 14. it is ordered that where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the Lord High Chancellor, the Master of the Rolls, or the Vice Chancellor, shall pay the sum of ten pounds, unless the Court shall make other order to the contrary.

By Lord Lyndhurst's orders, 14. 2 Russ. (Appendix), 9. it is ordered that every order for leave to amend the bill, shall contain an undertaking by the plaintiff to amend the bill within three weeks from the date of the order; and in default thereof, such order shall become void; and the cause shall, as far as relates to any motion to dismiss the bill for want of prosecution, stand in the same situation as if such order had not been made.

But it seems that this order is confined to amendments before the hearing.

Order on Default.

In *Cox v. Allingham*, 3 Mad. 393. the plaintiff neglecting to amend, was ordered to amend within a limited time. In *Yarroway v. Hand*, 2 Dick. 498. the plaintiff was ordered to amend by a given time, or the bill to be dismissed. In *Mitchell v. Lowndes*, 2 Cox, 15. the plaintiff having amended, but neglecting to proceed further, an order was made for dismissing the bill, upon which the plaintiff

undertook to speed the cause. But in *Lyonce v. Wye*, 9 Price, 166. in the Exchequer, a motion that the plaintiff should amend within a given time, or that the bill should be dismissed was held irregular; and that after hearing, the bill could not be dismissed on motion, but that the cause must be set down again, for which leave was given.

It seems that the original order sometimes directs that in default, the bill may stand dismissed; in which case upon default the cause will be out of Court without further order. See *Stevens v. Praed*, 2 Cox, 375. And see Decree for retaining bill with liberty to bring action. Decrees for Issue, &c. No. XV. *ante*.

APPENDIX (1).

Decree — Cause to stand Over.

His Lordship doth order that these causes do stand over; and that the plaintiff in the original cause do pay unto the defendants the costs of the day in the original cause; and that the said plaintiff be at liberty to make proper parties, either by amendment or supplemental bill, as he shall be advised. *Canning v. Canning*, L. C. 25th July, 1747. Reg. Lib. A. 1746. fol. 480.

No. II.

DECREE FOR CAUSE TO STAND OVER, WITH LIBERTY TO SUPPLY PROOFS.

His Lordship doth order that this cause do stand over; and that the plaintiff do pay unto the defendants the costs of this day's attendance (1). And that the plaintiff be at liberty to exhibit an interrogatory in the examiner's office, or to take out a commission to examine witnesses (2), for proof of the settlement of the 25th and 26th days of February 1738, in the pleadings of the cause mentioned; and that the defendants do join and strike commissioners' names, in a week after notice thereof to their clerk in court, or in default thereof, that the plaintiff be at liberty to take out such commission, directed to her own commissioners. And in case the defendants shall not examine any witness produced by themselves, then such commission is to be at the plaintiff's expense; but this is not to prevent the defendants from cross-examining any wit-

ness. And it is further ordered, that the defendants, the representatives of Thomas Johnson, the mortgagee of the estate in question, do produce the said settlement to the examiner, or at the execution of such commission, to the end it may be examined to, and also at the hearing of this cause. *Ore v. Johnson*, M. R. 12th July, 1748. Reg. Lib. B. 4747. fol. 408.

NOTES.

(1) See Costs of the Day, No. I. Note (3), *ante*.

(2) *Defective Evidence.*

A cause is sometimes allowed to stand over, in order to supply a defect in the evidence produced ; as where office copies have not been signed by the proper officer. *Attorney-General v. Milward*, 1 Cox, 437. And see orders, 25th November, 1691, and 19th January, 1795. Beames, 289. 300.

So where an instrument is of such a nature that it is not necessary to be stamped previous to the commencement of the suit, the cause will be allowed to stand over, in order to get it stamped. *Huddleston v. Briscoe*, 11 Ves. 595.

In *Chervet v. Jones*, 6 Mad. 267. the Vice-Chancellor directed the cause to go on ; but that before the decree was delivered out the instrument should be produced to the register stamped.

So, in the case of a defective administration, the cause will be allowed to stand over. See *Davidson v. Foley*, 3 Bro. 604.

But not for the purpose of enabling the plaintiff to get one of the securities for an annuity enrolled. *Davidson v. Foley*, *supra*.

Sometimes a cause is allowed to stand over in order to produce further evidence, and liberty is given by the decree to exhibit interrogatories for that purpose. *Ore v. Johnson*, *supra*.

As where the heir at law stated his belief only as to the execution of the will ; which was held insufficient without proof of the will. *Potter v. Potter*, 1 Ves. 274. Belt's Suppl. 147.

So where the defendant in a creditor's suit stated her belief only that the debt of the plaintiff was due. *Hill v. Binney*, 6 Ves. 738. But whether the belief of the defendant was not sufficient. Q. See the case.

So where facts are admitted by the answer of parties against

whom their admissions cannot be read. See Lord Redesdale, 266. *Hodgson v. Merest*, 9 Price, 563.

So where an infant heir was not held bound by the admission of his ancestor. *Cartwright v. Cartwright*, 2 Dick. 545.

So, where the plaintiff, having obtained an order to prove a deed *vivâ voce* at the hearing, and all the witnesses being dead, was not permitted to prove the hand-writing of a deceased witness, the cause was allowed to stand over, with liberty to exhibit an interrogatory for that purpose. *Bloxton v. Drewit*, Prec. in Ch. 64.

So where the death of a party was not proved. *Moons v. De Bernales*, 1 Russ. 307.

So where a will was proved, except as to the absence of a witness. *Wood v. Stane*, 8 Price, 613. Or as to the sanity of the testator. *Abrams v. Winshup*, 1 Russ. 526. *Wallis v. Hodgson*, 1 Russ. 527. note.

Sometimes the order is made on a motion made at the hearing for that purpose. *Attorney-Genetal v. Thurnall*, 2 Cox. 2.

Sometimes the cause is directed to stand over, with liberty to make an application : As where proof of the loss of a deed was held insufficient to let in secondary evidence. *Cox v. Allingham*, Jac. 337. And see *Banks v. Farquharson*, 1 Dick. 167. S. C. (*Banks v. Farques*) Ambl. 145.

Sometimes a decree is made in part, with liberty to supply proofs : As where the heir at law is an infant, and the will is not proved against him, a decree may be obtained for an account of the personal estate, with liberty to exhibit interrogatories to prove the will. See *Lechmere v. Brasier*, 2 J. & W. 289.

So where the heir at law of a trader is an infant, and the trading is omitted to be proved. *Lechmere v. Brasier*, *supra*. And see Decrees in Supplemental Suits, No. IV. *post*.

So where one of the parties to an account is not proved to be out of the jurisdiction, an account may be directed, with liberty to supply the proof by an interrogatory. *Butler v. Borton*, 5 Mad. 42.

A fact having been unnecessarily alleged, a decree was made subject to an inquiry as to that fact. *Edney v. Jewel*, 6 Mad. 165.

On a bill for the administration of the assets of a trader, a reference has been directed as to the trading. *Elgar v. Coleman*, Appendix (1). *Hagden v. Bousey*, Ib.

But a reference ought not to be directed as to facts which are the

foundation of the relief, as the execution of a will, or the fact of trading. *Lechmere v. Brasier*, 2 J. & W. 288.

In some cases deficiency of proof against infants may be supplied by a reference. *Quantock v. Bullen*, 5 Mad. 82. And see Decrees in Supplemental Suits, No. IV. *post*.

Further Hearing.

When proofs are allowed to be supplied by interrogatories, the depositions cannot be published without an order. *Rossiter v. Pitt*, 2 Mad. 165. And see *Attorney-General v. Thurnall*, 2 Cox, 2.

After publication the cause must be again set down. See *Lechmere v. Brasier*, 2 J. & W. 289.

APPENDIX (1).

Inquiry as to Trading.

It is ordered that the said Master do inquire whether the said testator was a trader within the intent and meaning of the statutes relating to bankrupts. And in case he shall find that he was such trader, it is ordered that he do inquire what real estate the said testator died seised or possessed of or entitled to, and what interest he had therein. *Elgar v. Coleman*, M. R. 15th November, 1814. Reg. Lib. A. 1814. fol. 119.

For like decree see *Hagden v. Bousey*, M. R. 29th November, 1814. Reg. Lib. A. 1814. fol. 610.

DECREE BY DEFAULT, &c.

No. I.

DECREE BY DEFAULT.

This cause coming before this Court in the presence of counsel learned for the plaintiff, none appearing for the defendant, although he hath been duly served with a subpoena to hear judgment in this cause, as by affidavit now read appears; the substance of the plaintiff's bill appeared to be that &c. Whereupon and upon hearing the defendant's answer read (1) and what was alleged &c. This Court doth think fit and so order and decree that &c. (2). And this decree is to be binding unto the said defendant, unless he on being served with a subpoena (3), to be served on him for that purpose, shall shew unto this Court good cause to the contrary (4). But the said defendant before he is to be admitted to shew such cause is to pay unto the plaintiff his costs (5) of this day's default in appearance, to be taxed by the said Master. *Rolle v. Wilcox, (Clarke, B. & others), 4th November, 1746. Reg. Lib. B. 1746. fol. 101. See Gilb. For. Rom. 156.*

For like decree. See *Equity Draftsman*, 664.

For like decree against infant. See *Equity Draftsman*, *Ib.*

NOTE.

(1) The answer should be entered as read. See *Lord Clarendon's orders. Beames 198. Halsey v. Smyth, Mos. 186. Gilb. For. Rom. 151. 154.*

But not the evidence. *Stubbs v. ———, 10 Ves. 30. And see Webb v. Litcot, 3 Atk. 25. S. C. 1 Dick. 88.*

Where however the heir at law made default at the hearing, the Court would not declare the will well proved without hearing the evidence read. *Webb v. Litcot, supra.*

(2) *Decree by Default.*

It is usual to direct that the plaintiff shall take such decree as he can abide by. Harr. 310.

It is not a judgment pronounced by the Court, but the act of the party. *Carew v. Johnston*, 2 Sch. & Lefr. 300. *Knight v. Young*, 2 V. & B. 186. Otherwise in the case of a decree, *pro confesso*. *Knight v. Young*, *supra*. And see Decree *pro confesso*, No. IV. *post*.

Where one of the defendants to a bill of interpleader makes default, an absolute decree will be made against him in the first instance. *Hodges v. Smith*, 1 Cox, 357.

(3) *Subpœna.*

This subpœna is a judicial writ and must be made returnable in term. Harr. 310. And see order for making Decree absolute, No. II. *post*.

For writ of subpœna to shew cause. See Appendix to Reg. Brev. 47.

There is no fixed time for the service of it before the day to shew cause, which is attended with inconvenience. Harr. 310.

For service of subpœna. See *Lander v. Whitmore*, 2 Dick. 596.

For order for service on clerk in Court. See Hand's Pract. 125.

(4) *Shewing Cause.*

The defendant may either shew cause against making the decree absolute, or petition for a rehearing. See setting aside Decree by Default, Note (5), *post*.

Want of parties may be shewn as cause against making a decree absolute. *Jackson v. Lee*, 1 Dick. 92.

A trustee having made default at the hearing and set down the cause again, was allowed his costs. *Norris v. Norris*, 1 Cox, 183.

(5) *Costs.*

Before being admitted to shew cause, the defendant must produce a certificate of the payment of the costs, or an affidavit of a tender and refusal. See Lord Clarendon's orders. Beames, 198. And see Harr. 311.

By the order of the 30th April, 1700, Beames, 314. the defendant is not to be admitted to shew cause, or to rehear the cause until he has paid the full costs of the hearing, and if the decree has been made absolute, the costs to the time of rehearing.

*Decree by Default &c.**Setting aside Decree by default.*

After the service of the subpoena the defendant may upon petition have the cause set down again for hearing upon payment of costs of his default as of course. Harr. 311.

In *Margravine of Anspach v. Noel*, 19 Ves. 573. S. C. 1 Mad. 313. it was held that the cause should be appointed for a particular day, not set down at the end of the causes already set down, according to the former practice.

But in *Undershell v. Norton*, Rolls, 25th February, 1828, MS. it was held that the old practice was correct; and that upon its being so set down, either party might apply to advance it.

After a decree by default is made absolute a rehearing will be permitted on terms. *Cunningham v. Cunningham*, 1 Dick. 145. S. C. Ambl. 89. *Foyl v. Foyl*, cited Ambl. 91. *Fry v. Prosser*, 1 Dick. 298. *Vowles v. Young*, 9 Ves. 172. *Attorney-General v. Brooke*, 3 Mer. 698. S. C. 18 Ves. 319. 496. And see *Knight v. Young*, *supra*.

So notwithstanding second default. *Hankwitz v. O'Carrell*, 1 Dick. 109.

So notwithstanding report under decree by default confirmed absolutely, and time for redeeming elapsed. *Kinsay v. Kinsay*, cited 1 Dick. 145.

The plaintiff cannot apply for a rehearing until the decree has been made absolute. *Baxter v. Wilson*, 2 Atk. 152.

The plaintiff having made default at the hearing, and the bill having been dismissed, was permitted to rehear the cause on terms. *Tarrant v. Wake*, cited. Ambl. 90. S. C. (*Terran v. Waite*), 2 Dick. 782.

By Lord Clarendon's orders, Beames, 315. the order for rehearing should be procured before the end of the next term after the decree is made absolute.

But this order is not acted upon.

A decree by default made absolute cannot be varied on motion. *Williams v. Jones*, 13 Price, 265. And see *Knight v. Young*, 2 V. & B. 186. *Attorney-General v. Brooke*, 3 Mer. 698.

Whether a decree by default can be varied at the time for making it absolute to the prejudice of a party not appearing. Q. *Williams v. Jones*, *supra*.

An appeal from a decree by default made absolute was dismissed, as the evidence not having been read on the original hearing, could not be read on the appeal. *Button v. Price*, Prec. in Ch. 212.

No. II.

ORDER MAKING DECREE ABSOLUTE.

Whereas by an order of the 14th day of May last, made on the hearing of this cause, it was ordered and decreed that &c. and the said decree was to be binding upon the defendant E. M. unless &c. [See No. I. *ante.*] Now upon motion this day made unto this Court by Mr. C. being of the plaintiff's counsel, it was alleged that the defendant E. M. hath been duly served with a subpoena to shew cause against the said decree, returnable the first day of this term (1) as by affidavit appears; and no cause being shewn to the contrary thereof, as by the Registrar's certificate appears; it was therefore prayed that the said decree may be made absolute, which is ordered accordingly. *Wilcox v. Monk*, L. C. 25th October, 1746. Reg. Lib. B. 1746. fol. 4.

Fo like orders. See Hand's Pract. 126. Equity Draftsman, 612.

NOTE.

(1) See No. I. Note (3), *ante.*

No. III.

FURTHER DIRECTIONS.

This cause having on the 6th of December, 1743, received a hearing before the Right Honourable &c. and the scope of the bill being &c. whereupon it was ordered and decreed that &c. and the consideration of costs as between the plaintiff and the defendant Crump was reserved until after &c. and the said decree was to be binding upon the said defendant Crump unless &c. [See No. I. *ante.*] That the said order of the 6th day of December, by order of the 6th of March, was made absolute, pursuant whereto the said Master by his report &c. which stands absolutely confirmed, certified that &c. And this cause coming this present day to be heard as to the matter of costs reserved by the said decree in the presence of counsel learned for the plaintiff, none appearing for the defendant Crump, although he was served with the order for

setting the cause down to be heard as to the matter of costs, as by affidavit now read appears. Whereupon and upon hearing of what was alleged by the plaintiff's counsel, this Court doth order that the defendant Crump do pay unto the plaintiff his costs of this suit to be taxed by the said Master. *Cotton v. Crump*, M. R. 17th March, 1748. Reg. Lib. A. 1747. fol. 304.

NOTE.

Where the defendant makes default at the original hearing, and again makes default at the hearing for further directions, the decree on further directions will be made absolute in the first instance. *Cotton v. Crump*, *supra*.

So where the cause is adjourned on the original hearing, and the defendant makes default at the further hearing, an absolute decree will be made. *Halsey v. Smith*, Mos. 186. *Venemore v. Venemore*, 1 Dick. 93.

So in the Exchequer. See *Geale v. Winter*, 1 Eagle and Younge, 743. S. C. Bunb. 40.

No. IV.

DECREE FOR TAKING BILL PRO CONFESSO UNDER THE STATUTE.

This cause coming this present day to be heard and debated before the Right Honourable &c. in the presence of counsel learned for the plaintiff, and all the defendants except the defendant Walter Hendley. (1) The substance of the plaintiff's bill appeared that &c. Whereupon and upon debate of the matter, and hearing of what could be alleged by the counsel for the plaintiff, and all the defendants except the defendant Walter Hendley; and forasmuch as the said plaintiff sued out a subpoena to compel the defendant Walter Hendley to appear to, and answer the plaintiff's bill, and the said defendant not appearing thereto, and absconding to avoid being served with such subpoena, as by affidavit appeared, the said plaintiff obtained an order bearing date the 27th day of May, 1746, that the said defendant should appear to the plaintiff's bill on or before the 27th day of June then next; and the said order

having been duly published and read, pursuant to the late Act of Parliament in that case made and provided, as by affidavit of H. M. and the London Gazette of the 3d day of June 1746, appeared; and the said defendant not having appeared to the plaintiff's bill, it was, by an order of the 20th day of February last, ordered that the plaintiff's Clerk in Court should attend with the record of the plaintiff's bill, in order to have the same taken *pro confesso* against the said defendant Walter Hendley; and the Clerk in Court for the plaintiff now attending therewith accordingly. Upon reading the said order of the 20th day of February last, the affidavit of J. T. and the said Gazette, and an order of the 27th day of May, 1746, and the affidavit of H. M. His Honour doth think fit, and so order and decree that the plaintiff's bill be taken *pro confesso* (2) against the defendant Walter Hendley. *Powys v. Hendley*, M. R. 6th March, 1747. Reg. Lib. B. 1746. fol. 200.

For order for appearance under the statute. See Equity Draftsman, 608.

For the like order in the Exchequer. See 1 Fowl. 236.

For orders for attendance of Clerk in Court, with the record of the bill. See Hand's Pract. 40. Equity Draftsman, 608.

For order in the Exchequer to set down the cause. See 1 Fowl. 238.

For order to appoint Clerk in Court under the statute. See Equity Draftsman, 591. 607.

For like order in the Exchequer. See 1 Fowl. 231.

For order for making decree absolute under the statute after service. See Equity Draftsman, 620.

For decrees for taking bill *pro confesso*, not under the statute See Equity Draftsman, 652, 653.

For decree taking bill *pro confesso* as to one defendant only. See Equity Draftsman, 653.

For order in the Exchequer for taking bill *pro confesso* not under the statute. See 1 Fowl. 222.

NOTE.

(1) Where there is only one defendant the bill may be ordered to be taken *pro confesso* upon motion; but if there are more defendants

setting the cause down to be heard as *pro confesso*. *Edwards*, 3 Ves.
 as by affidavit now read appears.
 hearing of what was alleged by *pro confesso*.
 Court doth order that the defendant shall pay his costs of this suit. 184. it is said by Lord Redes-
 plaintiff his costs of this suit. party taking a decree *pro confesso*
Cotton v. Crump, M. R. 1. in *Geary v. Sheridan*, 8 Ves. 192. it was
 fol. 304.

pro confesso is pronounced by the Court upon
 And see *Knight v. Young*, 2 V. & B. 186.
 Mos. 386. S. C. 2 P. W. 556. *Johnson v.*
 224. Otherwise in case of decree by default,
 Decree by Default, No. I. note (2), *ante*.
Cotton v. Lord Coningsby, 2 Eq. Abr. 280. pl. 8. (which was
 So w^t 5 Geo. 2. c. 25.) it was doubted whether the
 defer should not be nisi only in the first instance. But in *Landon*
 wil^t 1 S. & S. 44. (which was not within the statute, the
 defendant having appeared) the Vice-Chancellor held, that whether
 before or after appearance, the decree was absolute in the first
 instance.

Setting aside Decree *pro confesso*.

An order for taking the bill *pro confesso* may be discharged on
 motion. See *Williams v. Thomson*, 2 Bro. 280. S. C. 1 Cox, 413.
 And see *Attorney-General v. Young*, 3 Ves. 209.

But it will not be discharged merely on the ground of an answer
 being put in. *Williams v. Thomson*, *supra*. And see *Heyn v. Heyn*,
 Jac. 50.

Nor upon payment of costs. *Hearne v. Ogilvie*, 11 Ves. 77.

Nor upon an affidavit of the defendant as to his own imbecility.
Knight v. Young, 2 V. & B. 184.

After a decree *pro confesso*, the defendant will not be let in
 generally, as if no decree had been made. *Bolton v. Glassford*,
 cited 2 V. & B. 186.

After a decree *pro confesso* for an account, the defendant was
 allowed to attend the Master, upon payment of costs. *Heyn v.*
Heyn, Jac. 49.

In *Maynard v. Pomfret*, 3 Atk. 468. after a decree for an account
 taken *pro confesso* upon a sequestration, the Court refused to dis-
 charge the sequestration, but kept it on foot as a security for what

be due. But in *Heyn v. Heyn*, *supra*, the Court,
ances, discharged the sequestration.

ing aside a decree under the statute. See
s. 4, 5, 6, 7.

der the statute, like other decrees, cannot be im-
iginal bill. *Ogilvy v. Hearne*, 13 Ves. 563.

than one, the cause must be set down. *Seagrave v. Edwards*, 3 Ves. 372. *Lewis v. Marsh*, 2 S. & S. 220.

(2) *Decree pro confesso.*

In *Hamilton v. Houghton*, 2 Bligh. 184. it is said by Lord Redesdale, that it is the business of a party taking a decree *pro confesso* to see that it is right. But in *Geary v. Sheridan*, 8 Ves. 192. it was held, that the decree *pro confesso* is pronounced by the Court upon hearing the pleadings. And see *Knight v. Young*, 2 V. & B. 186. *Hawkins v. Croke*, Mos. 386. S. C. 2 P. W. 556. *Johnson v. Desmineere*, 1 Vern. 224. Otherwise in case of decree by default, S. Cs. And see Decree by Default, No. I. note (2), *ante*.

In *Howell v. Lord Coningsby*, 2 Eq. Abr. 280. pl. 8. (which was before the statute 5 Geo. 2. c. 25.) it was doubted whether the decree should not be *nisi* only in the first instance. But in *Landon v. Ready*, 1 S. & S. 44. (which was not within the statute, the defendant having appeared) the Vice-Chancellor held, that whether before or after appearance, the decree was absolute in the first instance.

Setting aside Decree pro confesso.

An order for taking the bill *pro confesso* may be discharged on motion. See *Williams v. Thomson*, 2 Bro. 280. S. C. 1 Cox, 413. And see *Attorney-General v. Young*, 3 Ves. 209.

But it will not be discharged merely on the ground of an answer being put in. *Williams v. Thomson*, *supra*. And see *Heyn v. Heyn*, Jac. 50.

Nor upon payment of costs. *Hearne v. Ogilvie*, 11 Ves. 77.

Nor upon an affidavit of the defendant as to his own imbecility. *Knight v. Young*, 2 V. & B. 184.

After a decree *pro confesso*, the defendant will not be let in generally, as if no decree had been made. *Bolton v. Glassford*, cited 2 V. & B. 186.

After a decree *pro confesso* for an account, the defendant was allowed to attend the Master, upon payment of costs. *Heyn v. Heyn*, Jac. 49.

In *Maynard v. Pomfret*, 3 Atk. 468. after a decree for an account taken *pro confesso* upon a sequestration, the Court refused to discharge the sequestration, but kept it on foot as a security for what

should be found to be due. But in *Heyn v. Heyn*, *supra*, the Court, under the like circumstances, discharged the sequestration.

For the mode of setting aside a decree under the statute. See statute 5 Geo. 4. c. 25. s. 4, 5, 6, 7.

A decree not under the statute, like other decrees, cannot be impeached by original bill. *Ogilvy v. Hearne*, 13 Ves. 563.

DECREES BY CONSENT.

No. I.

DECREE BY CONSENT.

This Court doth by consent order &c. [See Decree for Reference to Arbitration, No. II. *post.*]

For orders by consent making an agreement between the parties an order of the Court. See Hand's Pract. 234. 2 Fowl. 416. Equity Draftsman, 614.

For order for making an award an order of the Court. See 2 Fowl. 417.

NOTE.

Decree by Consent.

Sometimes the decree is stated to be by consent generally.

Sometimes by consent of counsel. Collins v. White, Appendix (1). Robinson v. Harrington, Appendix (2).

Sometimes by the consent of the Clerks in Court. Richards v. Evans, Decrees respecting Tithes, No. II. *ante.*

Sometimes by the consent of the parties, or their Clerks in Court, testified by their signing the Registrar's book. Collins v. White, *supra.* Robinson v. Harrington, *supra.*

Setting aside Decree by Consent.

A decree or order by consent of the counsel for the parties cannot be set aside either by rehearing or appeal. Bradish v. Gee, Ambl. 229. Harrison v. Rumsey, 2 Ves. 488. Belt's Supp. 413. Toder v. Sansam, 7 Bro. P. C. 244. Downing v. Cage, 1 Eq. Abr. 165. 4. Norcot v. Norcott, 7 Vin. 398. 13. Windham v. Windham, Freem. 127.

In Anon. 1 Ves. jun. 93. the Lord Chancellor seemed to think that it might by a bill of review. But in Webb v. Webb, 3 Swan. 658. a bill of review to set aside a decree by consent was dismissed by Lord Nottingham. And see Smith v. Turner, 1 Vern. 274.

But if the decree was obtained by fraud, relief may be had against it on an original bill. *Bradish v. Gee, supra*, and cases there cited. And see *Harrison v. Rumsey, supra*.

If the party did not in fact consent, his remedy is against his counsel. *Bradish v. Gee, supra*. *Harrison v. Rumsey, supra*.

Counsel must determine for themselves on their authority to consent. *Mole v. Smith*, 1 J. & W. 673.

Where counsel for the same party were instructed by different solicitors, the case was ordered to stand over in order that the authority of the solicitors might be verified by affidavit. *Butterworth v. Clapham*, 1 J. & W. 673, note.

That counsel for an infant heir may decline taking an issue. See *Levy v. Levy*, 3 Mad. 245.

An agreement to submit to such decree as the Court should make, and that neither party should appeal, though made an order of the Court by consent, will not prevent a rehearing. *Buck v. Fawcett*, 3 P. W. 242. Whether such an agreement is not contrary to the policy of the Court, Q. S. C.

It seems that consenting to an order consequential on a decree does not prevent a rehearing. *Wood v. Griffith*, 19 Ves. 551. S. C. 1 Mer. 38.

But a party taking a step inconsistent with the order is precluded. *Bernal v. Marquis of Donegal*, 3 Dow. 146.

In the case of infants the Court does not usually make a decree by consent, without a previous enquiry whether it will be for their benefit. *Wall v. Bushby*, 1 Bro. 488.

But if made without that inquiry, the infants are bound. S. C. And see *Anon. Freem.* 127.

After a hearing by consent a cause may be reheard. See *Butterfield v. Butterfield*, 1 Ves. 133. *Belt's Supp.* 83. *Hibbert v. Hibbert*, 3 Mer. 682.

APPENDIX (1).

Decree by Consent.

His Lordship by consent of the plaintiff Collins and the defendant White, signified by their signing the Registrar's book, and of Mr. Green of counsel for the defendant Evans, doth order that all the matters in difference in these causes, be referred to the arbitration and determination of Randal Wilbraham, Esq. &c. *Collins v. White*, L. C. 27th January 1747. Reg. Lib. A. 1746. fol. 186.

APPENDIX (2).

Decree by Consent.

And by consent of the defendants, the Nicholls's and Backwell, the mortgagees, by their counsel, and of the defendant Thomas Carew the only acting executor of John Carew, Esq. deceased, another mortgagee, signified by his Clerk in Court having signed the Registrar's book; it is further ordered that the estate in question be sold &c. *Robinson v. Harrington*, L. C. 30th June, 1755. Reg. Lib. B. 1754. fol. 350.

No. II.

DECREE FOR REFERENCE TO ARBITRATION.

This Court doth by consent (1) order that all matters in difference between the parties, and the costs of this suit and of the arbitration, be referred to the arbitration, final end, and determination of W. C. of &c. who is to make his award in writing on or before the 26th day of May next. (2) And by the like consent, it is ordered that all deeds, books, and papers in the custody or power of either of the parties relating to the matters in question be produced before the said W. C. as he shall direct, to be ascertained by the oaths of the respective parties producing the same. And the parties and their witnesses (3), being first sworn before one of the Masters of this Court, are to be examined upon interrogatories or otherwise as the said arbitrator shall think proper. And by the like consent, no bill or bills (4) is or are to be filed by either of the parties against the said W. C. for any matter or thing he shall do in, about, or touching the matter referred to him. And by the like consent, the said arbitrator is to have power from time to time to enlarge the time (5) for making his award as he shall think fit. *Hogg v. Pearson*, V. C. 23d November, 1814. Reg. Lib. A. 1814. fol. 474.

For orders for reference. See *Hand's Pract.* 230. *Equity Draftsman*, 634. 637. 641.

For commission for arbitration. See *Appendix to Reg. Brev.* 49.

NOTES.

(1) *Consent.*

In the form of the order of reference at law, Tidd's App. 231. it is said to be "by and with the consent of the plaintiff and defendant, their counsel and attornies."

But at law a party is bound by the consent of his counsel and attorney to a reference, although he denies their authority. 1 Tidd's Pract. 107.

In equity it has been held that the consent of the solicitors is not sufficient. *Collwell v. Child*, Freem. 154. S. C. 1 Chan. Rep. 195. 1 Chan. Ca. 86. 1 Eq. Abr. 49. Com. Dig. "Chancery," W. 4.

A fortiori, where some of the parties are infants. *Biddell v. Dowse*, 6 B. & C. 264. *Cavendish v. —*, 1 Ch. Ca. 279. S. C. 1 Eq. Abr. 50.

But the consent of counsel is binding on the parties See Setting aside Decree by Consent, No. I. Note, *ante*.

In a charity cause a decree may be obtained for a reference to arbitration in a proper case, if the Attorney-General consents. *Attorney-General v. Fea*, 4 Mad. 274. But a reference to arbitration will not be directed upon the construction of a will. S. C.

In such case the reference should be to the referee by name, not as arbitrator. *Attorney-General v. Hewitt*, 9 Ves. 232.

(2) Sometimes the reference is conditional upon the award being made within the time limited. See Hand's Pract. 231. *Equity Draftsman*, 641. And see Tidd's App. 231.

But where the reference is absolute, if liberty to apply is reserved, and the reference fails, the suit may be proceeded in. *Crawshay v. Collins*, 3 Swan. 90. And see Liberty to apply, Note (5). *post*.

Sometimes power is given to the arbitrators to appoint an umpire. See *Equity Draftsman*, 634.

(3) Sometimes leave is given to read the depositions in the cause. and to examine the witnesses to them. See Hand's Pract. 231.

(4) This direction is sometimes extended to actions at law as well as bills, both by the parties against the arbitrators, and each other. See Hand's Pract. 231. And see Tidd's App. 231.

But whether this is binding, as to bills in equity. Q. See *Nicholls v. Chalie*, 14 Ves. 268. 270. *Street v. Rigby*, 6 Ves. 815. *Lingood v. Crowcher*, 2 Atk. 395.

Decrees by Consent.

(5) Sometimes the enlargement of the time is made to be subject to the discretion of the Court. See Hand's Pract. 231. Equity Draftsman, 638.

Costs.

Sometimes provision is made for the costs incurred previously to the reference, and for the costs of the reference. See Equity Draftsman. 638. 641. And see Tidd's App. 231.

Sometimes the arbitrators are empowered to award costs against the parties for delay. See Hand's Prac. 231. And see Tidd's App. 231.

Liberty to apply.

Liberty is sometimes reserved to apply to make the award a rule of Court. See Hand's Pract. 232. Equity Draftsman, 642. And see Tidd's App. 231.

But the Court will enforce the award although it is not made a rule of Court. See Further Directions, *post*.

Liberty to apply should be reserved generally, as it authorizes proceedings on the award if made; and if not, in the suit. See *Crawshay v. Collins*, 3 Swan. 92. And Note (2), *supra*.

Exceptions to Award.

In *Cresly v. Carrington*, 1 Vern. 469. it was held that an award upon a reference made in a cause should be confirmed like a Master's report upon a motion *nisi*, and that exceptions might be taken to it. And see *Hide v. Cooth*, 2 Vern. 109. *Vernon v. Wells*, 2 Dick. 452. *Crawshay v. Collins*, 3 Swan. 92.

But in *Cressey v. Carrington*, 2 Vern. 80. it was held that exceptions did not lie to an award. And in *Price v. Williams*, 3 Bro. 163. S. C. 1 Ves. jun. 365. it was so held; and that the mode of proceeding is to move to set aside the award. And see what is said by the Solicitor-General in *Knox v. Symmonds*, 1 Ves. jun. 369.

In *Woodbridge v. Hilton*, 2 Dick. 640. S. C. 1 Bro. 398. it was held that if a matter is referred to arbitrators by a decree or order merely *ad computandum*, an exception would lie; but that if the reference was of all matters in difference, an exception would not lie.

In *Dick v. Milligan*, 2 Ves. jun. 23. S. C. 4 Bro. 117. 536. where there had been a reference to the Master, with a reservation of further directions, and by a subsequent order arbitrators were sub-

stituted for the Master, and were to take the account in like manner, leave was given to file exceptions. And see *Cressey v. Carrington*, 2 Vern. 80. note.

But in *Ford v. Gartside*, 2 Cox, 368. it was held that where there was a reference of all matters in difference, and the Court reserved nothing to itself, exceptions would not lie.

Sometimes it is provided by the order that exceptions shall not be taken. See *Equity Draftsman*, 638.

Further Directions.

Where there is a reference of all matters in dispute, further directions are not reserved. See *Ford v. Gartside*, 2 Cox, 368.

The Court will enforce the award on motion, without its being made a rule of Court. *Marquis of Ormond v. Kynnersley*, 2 S. & S. 15.

And, it seems, notwithstanding the reference directs arbitration bonds to be executed, S. C.

The Court will not direct the arbitrators to proceed. *Crawshay v. Collins*, 1 Swan. 40.

But where liberty to apply has been reserved, if the arbitrators decline to proceed, the suit may be prosecuted as if no reference had been made. S. C. 3 Swan. 90.

See *Liberty to apply*, *ante*.

DECREEES FOR DISMISSION.

No. I.

DECREE FOR DISMISSION. (1)

His Lordship doth order, that the plaintiff's bill do stand dismissed out of this Court with costs (2), to be taxed by Mr. E. one of the Masters of this Court. *Pattenson v. Musgrave*, L. C. 7th December, 1747. Reg. Lib. B. 1747. fol. 84.

For like decree. See *Equity Draftsman*, 596.

No. II.

DECREE FOR DISMISSION AS TO PART.

His Lordship, as to so much of the plaintiff's bill as seeks &c. doth order that the same be dismissed with costs &c. [See above.] And as to the rest of the relief sought by the plaintiff's bill, it is ordered, that &c. *Carte v. Hodgkin*, L. C. 20th May, 1748. Reg. Lib. A. 1747. fol. 628.

For decree for dismissal on default by plaintiff. See *Equity Draftsman*, 595.

For order for dismissal without costs by consent. See *Hand's Pract.* 72. *Equity Draftsman*, *supra*.

For order for dismissal with costs at the instance of plaintiff. See *Hand's Pract.* 73. *Equity Draftsman*, *supra*.

For orders for dismissal for want of prosecution. See *Hand's Pract.* 74. 84. &c. *Equity Draftsman*, *supra*.

NOTES.

(1) Formerly the words "The Court seeing no cause to relieve" &c. were prefixed to the words of dismissal. And on this ground

it was held, that a bill of discovery, if brought to a hearing, would, not be dismissed, but that the cause must be struck out of the paper. *Anon. Mos. 185.*

For order for costs upon a bill of discovery. See *Hand's Pract. 59.*

For like order on bill to perpetuate testimony. See *Hand's Pract. 92.*

(2) *Costs.*

Where a bill is dismissed with costs, the decree may be pre-faced with a direction for the payment of the costs of motions made in the cause, which would not otherwise be costs in the cause. *Wild v. Hobson, 4 Mad. 49. Daugbigny v. Cockburne, there cited.* As to what costs of motions are costs in the cause. See *Memorandum, 1 S. & S. 357.* In *White v. Hollis, 4 Mad. 226.* it is said, that the costs of a motion refused are not costs in the cause, and the motion was refused with costs on that ground. But see *Memorandum, 1 S. & S. supra.*

That a bill may be dismissed at the hearing (whether heard on bill and answer or not), either with or without costs; or if heard on bill and answer, with 40s. costs; or partly with and partly without costs; or with costs as to some parties, and without costs as to others. See *Beames on Costs, 231.* Order, 27th April, 1748. *Beames, 450.* Order of Exchequer, 8th July, 1748. *2 Fowl. 376.*

Upon an interlocutory application, either by the plaintiff to dismiss his own bill, or by the defendant to dismiss the bill for want of prosecution, the plaintiff must pay full costs, to be taxed by a Master. See statute 4 Ann. c. 16. s. 23. And *Beames on Costs, 229.*

No. III.

DECREE FOR DISMISSION, WITH LIBERTY TO
BRING ACTION.

His Honour doth order, that the plaintiff's bill, as against the defendant Samson, do stand dismissed out of this Court with costs, to be taxed by Mr. E. one &c. and as against the defendant Hockin, without costs. And the plaintiff is to be at liberty to bring an action on the said agreement against the defendant Hockin, in the name of himself and

Decrees for Dismission.

the defendant Samson, he indemnifying the defendant Samson therein. *Edwards v. Hockin*, M. R. 14th May, 1747. Reg. Lib. A. 1746. fol. 406.

Dismission without Prejudice.

Where a bill is dismissed at the hearing, the decree is sometimes expressed to be without prejudice, in order to prevent its being pleaded in bar to a new bill for the same matter. See Lord Redesdale, p. 194.

Formerly, where a bill was dismissed for want of parties, it was expressed to be without prejudice. See *Stafford v. City of London*, 1 P. W. 429. And see Decrees for Cause to stand over, &c. No. I. Note (2), *ante*.

So where a bill is dismissed in consequence of facts not being put in issue it will be without prejudice to any future proceeding in respect of such facts. *M'Neil v. Cahill*, 2 Bligh, 263.

So where a bill for specific performance is dismissed in consequence of the agreement proved differing from that insisted on by the plaintiff, it will be dismissed, without prejudice to a new bill. *Woollam v. Hearn*, 7 Ves. 222. *Lindsay v. Lynch*, 2 Sch. & Lefr. 1.

So where a bill for specific performance was dismissed, and the plaintiff was held precluded by the frame of his bill from insisting on inquiries with a view to compensation. *Stevens v. Guppy*, 3 Russ. 171.

Where a bill for a specific performance is dismissed, the plaintiff is not precluded from proceeding at law for damages. *M'Namara v. Arthur*, 2 Ba. & Be. 353. And see *Ellard v. Lord Landaff*, 1 Ba. & Be. 251. *Mortlock v. Buller*, 10 Ves. 292.

But a direction that the dismissal shall be without prejudice to an action is sometimes introduced, in order to prevent any improper impression being made against the plaintiff on the trial at law. *M'Namara v. Arthur*, *supra*.

Sometimes the Court dismisses a bill for specific performance without costs, the plaintiff undertaking not to proceed at law. S. C. And see *Beames on Costs*, 63. 171.

Sometimes leave is expressly given to bring an action. *Edwards v. Hockin*, *supra*.

In *Mackerell v. Hunt*, 2 Mad. 34. note, the Master of the Rolls, on dismissing a bill to perpetuate testimony, directed it to be without

prejudice to the evidence for perpetuating the testimony. But the Lord Chancellor thought that this clause should not have been added, but that the bill should have been dismissed generally, and that the evidence might nevertheless have been at any time afterwards read. S. C.

Where a decree for tithes is made in consequence of a modus not being properly laid or proved, it will be declared to be without prejudice to the right of the defendant to insist upon the modus in any other suit. *Woolley v. Brownshell*, 13 Price, 521. And see *Lake v. Skinner*, 1 J. & W. 20. And cases cited by the Master of the Rolls in his judgment and in the note.

Although tenants are not bound by decrees on suits to which they are not parties, decrees are sometimes made expressly, without prejudice to their rights. Lord Redesdale, 142. And see decree in *Kennedy v. Daly*, 1 Sch. & Lefr. 385. But that although not expressly mentioned they will be protected. See *Shine v. Gough*, 1 Ba. & Be. 436.

This direction should not be inserted, where the party cannot, from the nature of the suit, be prejudiced by the decree. See *Attorney-General v. Earl of Mansfield*, 2 Russ. 516. And see *Mackerell v. Hunt*, *supra*.

DECREES ON BILLS OF REVIVOR AND SUPPLEMENT, &c.

No. I.

ORDER FOR REVIVOR.

Upon motion this day made unto this Court by Mr. G. being of the plaintiff's counsel, it was alleged that the plaintiffs, in or about &c. exhibited their bill into this Court against Sir W. B. Knt. and others, to be relieved touching the several matters therein contained; and that the said bill was afterwards amended by order of this Court, and several parties added thereto as defendants; and the said Sir W. B. and the other defendants appeared accordingly, and put in their answers thereto. That before any further proceedings were had in the said cause, the said Sir W. B. died, having first duly made his will, and thereof appointed his daughter E. R. spinster, T. P. gent. and M. R. Esq. executors, who duly proved the same, and the said suit and proceedings abated by the death of the said Sir W. B. That the plaintiffs have lately exhibited their bill of revivor into this Court against the defendants to which they have appeared; and their time for answering being out, it was therefore prayed that the said suit and proceedings may stand revived, and be in the same plight and condition they were in at the time of the death of the said Sir W. B. which is ordered accordingly. *Morgan v. Raper*, L. C. 13th October, 1746. Reg. Lib. B. 1746. fol. 459.

For orders for revivor after appearance. See Hand's Pract. 16. 34.

For like orders after answer. See *Ib.* 53, 54.

For like orders after cause at issue. See *Ib.* 90.

For like orders after cause set down. See *Ib.* 91. 108.

For like orders after decree. See *Ib.* 130. 140. 160. 166.

For like orders after report and decree in supplemental suit. See *Ib.* 185.

For order for subpoena, in nature of *sci. fa.* to revive. See *Harr.* 521. *Equity Draftsman*, 606.

For like order made absolute. See *Equity Draftsman*, *Ib.*

Order for Revivor.

Where the bill of revivor is filed against a personal representative, and assets are admitted by the defendant, the cause may proceed against him upon an order of revivor merely. See *Lord Redesdale*, 60.

Where the defendant does not admit assets, the cause must be heard, for the purpose of taking the accounts. See *Lord Redesdale*, *supra*.

So where the defendant insists, by answer, that the plaintiff is not intitled to revive. See *Harris v. Pollard*, 3 P. W. 348.

Where a bill of a revivor requires to be brought to a hearing, it must be brought to a hearing in the same manner as a supplemental bill. See *Decree in Original and Supplemental Suits*, No. II. *post*.

No. II.

DECREE IN ORIGINAL AND SUPPLEMENTAL
SUITS—INTRODUCTORY PART.

Henry John, plaintiff; William Brown the elder, and
William Brown the younger, and Francis Stephens,
defendants. By original and supplemental bills.

This cause coming this present day to be heard and debated &c. the substance of the original bill appeared to be that &c. To which bill the defendant William Brown, jun. put in his answer. And the substance of the supplemental bill appeared to be that &c. Whereto the counsel for the defendants William Brown, sen. and William Brown, jun. alleged that the said defendant William Brown, jun. by this answer to the said original bill, says, that &c. and that the defendants William Brown, sen. and William Brown, jun. by their answer to the said supplemental bill set forth &c. And the counsel

for the defendant Stephens allege, that he, by his answer, says that &c. Whereupon, and upon debate of the matter, and hearing &c. his Honour doth order &c. *John v. Brown*, M. R. 15th December, 1747. Reg. Lib. A. 1747. fol. 154.

NOTE.

If the cause has not been heard upon the original bill, it must be heard upon the supplemental bill at the same time that it is heard upon the original bill, unless the supplemental bill is for discovery only. Lord Redesdale, 59. *John v. Brown*, *supra*.

For this purpose the supplemental cause will be advanced.

For order for advancing supplemental cause. See Hand's Pract. 108.

If the cause has been before heard on the original bill, it must be further heard upon the supplemental matter. Lord Redesdale, *supra*.

For this purpose the supplemental cause may be heard separately. Or with the original cause, for further directions. See *Attorney-General v. Hurst*. Decrees respecting Real Assets, No. XV. *ante*.

No. III.

DECREE IN SUPPLEMENTAL SUIT TO HAVE THE BENEFIT OF FORMER DECREE.

His Lordship doth order and decree that the decree made in the original causes, wherein the present plaintiffs were plaintiffs, and Thomas Claughton was defendant, and Thomas Claughton was plaintiff, and the present plaintiffs were defendants, bearing date &c. be carried on and prosecuted between the parties to this present suit, in like manner as thereby directed between the parties to the said original suits. And His Lordship doth reserve the consideration of all further directions, and of the costs of this suit, in like manner as costs and further directions were reserved by the said former decree. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante*.] *Johnes v. Leigh*, M. R. 15th February, 1826. Reg. Lib. A. 1825. fol. 1505.

No. IV.

DECREE IN ORIGINAL AND SUPPLEMENTAL
SUITS, FOR INQUIRY WHETHER IT WOULD
BE FOR THE BENEFIT OF INFANT DEFEND-
ANTS, TO SUPPLEMENTAL BILL TO ADOPT
PREVIOUS PROCEEDINGS.

This Court doth order that it be referred back to the said Master to inquire and state to the Court whether it will be for the benefit of such of the defendants to the said bill as are infants, that the said report shall be adopted as to them. And the said defendants, the infants, are to be at liberty to take objections before the said Master to the said report, or to any part thereof. And the said Master is to state the result of the said inquiry with his opinion thereon to the Court. And the said Master is also to inquire and state to the Court whether Henry Law in the pleadings named is now out of the jurisdiction of this Court. (1) And for the better discovery of the matters aforesaid &c. [See Usual Directions, No. I. *ante.*] And it is ordered that the plaintiffs be at liberty to exhibit one or more interrogatory or interrogatories in the Examiner's office, and to examine one or more witness or witnesses thereon, to prove that the testator William Law was at his death a trader, within the intent and meaning of the several statutes relating to bankrupts (1). And this Court doth continue the reservation of all further directions, and of the subsequent costs of this suit, until after the said Master shall have made his report. And any of the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Brookfield v. Bradley*, V. C. 19th June, 1822. Reg. Lib. A. 1821. fol. 1574.

NOTE.

(1) See Decrees for Cause to stand over &c. No. I. Note (2) *ante.*

No. V.

DECREE FOR LIBERTY TO PROSECUTE FORMER DECREE.

[*Inter alia*] His Honor doth think fit and so order and decree, that it be referred to the said Master to take an account of what is due to the plaintiff on his judgment in the pleadings mentioned ; and what shall be found due to the plaintiff is to be paid with the other judgment creditors of the said James Hunt, the grandson. And by consent of the plaintiff he is to come in under the said decree of the 26th day of June, 1752, and receive a satisfaction for what shall be found due to him on his said judgment according to the priority of the said judgment. And in case the plaintiffs in the said former cause shall delay prosecuting the said decree, the plaintiff is to be at liberty to prosecute the same in their names, indemnifying them in respect thereof. And for the better taking the said accounts &c. [See Usual Directions, No. II. *ante.*] And as to the costs of this suit, it is ordered that the said Master do tax the defendants Fowke and Jervoise their costs of this suit, and also the plaintiff his costs of this suit hitherto, and the said defendants Fowke and Jervoise, and the said plaintiff's said costs are to be paid out of the money arising by sale of the real estate of James Hunt, the grandson, under the said former decree. And it is ordered that the defendants Sir William Irby &c. be paid their costs of this suit, to be taxed by the said Master, out of the money arising by sale of the other estates of James Hunt, the father, in like manner as they are to receive their costs in the former cause. And the Court reserves the consideration of the plaintiff's subsequent costs, and of the costs of all the other parties until after &c. [See Usual Directions, No. XVII. *ante.*] And the parties are to be at liberty to apply &c. [See Usual Directions, No. XIX. *ante.*] *Torin v. Fowke*, M. R. 30th July, 1753. Reg. Lib. B. 1753. fol. 481. S. C. 1 Dick. 235.

NOTE.

See *Mildred v. Robinson*, 19 Ves. 585.

ORDERS ON REHEARINGS AND AP- PEALS.

No. I.

ORDER, ON APPEAL FROM THE ROLLS, AFFIRM- ING DECREE.

This cause having, on the 6th day of December, 1745, received hearing before the Right Honourable the Master of the Rolls, in the presence of counsel learned on both sides, and the pleadings in the cause being then opened. Whereupon and upon hearing the exhibits and proofs taken in the cause read, and what was alleged by the counsel on both sides (1), it was ordered, that &c. With which order the plaintiffs apprehending themselves aggrieved, for that &c. and therefore preferred their petition unto the Right Honourable the Lord High Chancellor, praying his Lordship to hear this cause; which being granted, on depositing 10*l.* with the registrar (2). And the said 10*l.* being deposited with the registrar accordingly, and this cause coming on the 25th day of October last, and also on this present day, to be heard before the Right Honourable the Lord High Chancellor, in the presence of counsel learned on both sides, and the pleadings in the cause being now again opened. Whereupon and upon debate of the matter and hearing the indenture &c. the answer of the defendants Horton &c. and the proofs taken in this cause, read, and what was alleged by the counsel on both sides, his Lordship saw no cause to vary the said order of dismissal; and doth therefore order that the same be affirmed; and that the 10*l.* so deposited by the plaintiffs with the registrar as afore-

Orders on Rehearings and Appeals.

said, be paid to the said defendants. *Matthews v. Horton* L. C. 8th Nov. 1746. Reg. Lib. B. 1746. fol. 94.

For order on rehearing affirming decree. See *Harr.* 328. *Hand's Pract.* 127.

For introductory part of appeal. See *Equity Draftsman*, 628.

No. II.

ORDER REVERSING DECREE.

His Lordship doth order, that that part of the said decree complained of by the said petition of rehearing be reversed, and instead thereof that &c. *Barnaby v. Greene*, L. C. 12th March 1748. Reg. Lib. A. 1747. fol. 312.

For order on rehearing, varying order on exceptions, and further directions. See *Horne v. Barton*, *Jac.* 441.

NOTES.

(1) *The Recitals.*

The following order as to the recitals on orders on rehearings and appeals, is among the orders of Lord Hardwicke. *Beames*, 381.

That in orders made on rehearings and appeals, where the first order is affirmed generally, nothing be recited previous to the ordering or decretal part of the former order on hearing; which ordering or decretal part may be fully recited, if the petition of rehearing or appeal complains of the whole order; but if such petition complains only of part of the order, then no more thereof is to be recited than is complained of, or what necessarily relate thereto; nor is more of such petition to be recited than the points complained of, and no recital is to be made of the reasons or allegations of counsel therein assigned. But in cases where the first order is varied, the scope and substance of so much of the pleadings only as is material, and tending to the points varied, is to be recited in the most concise manner.

No recitals are used in orders on appeals in Parliament. See *Order of House of Lords*, No. III. *post*.

(2) *Deposit.*

By Lord Lyndhurst's orders, 42. 2 Russ. (Appendix) 16. it is ordered, that the deposit upon every petition of appeal or rehearing be increase 1 to 20*l.* to be paid to the adverse party, when the decree or order appealed from is not varied in any material point, togethe-

with the further taxed costs occasioned by the appeal or rehearing, unless the Court shall otherwise order.

For former orders on this subject. See order of the 12th May, 1686, Beames, 265. Order of the 30th April, 1700, Beames, 314. Order of the 7th February, 1794, Beames, 458.

By the order upon the petition for a rehearing, in addition to payment of the deposit, an undertaking is usually required from the clerk in court to pay such further costs, subsequent to the decree, as the Court shall direct, 1 Turn. Pract. 501. And see *Vowles v. Young*, 9 Ves. 173.

No. III.

ORDER OF HOUSE OF LORDS ON APPEAL AND
CROSS-APPEAL FROM COURT OF CHANCERY.

[This was a branch of the cause of *Thellusson v. Woodford*, 4 Ves. 227. S. C. 11 Ves. 112. 1 New Rep. 357.]

The bill was filed on behalf of an infant, who was one of the great-grandsons of the testator Peter Thelluson, through a female, claiming the right to nominate according to the rotation prescribed by the will, to a vacancy in a living, part of the trust property.

On the hearing, the bill was dismissed unless an appeal should be brought within a limited time. S. C. L. C. 10th November, 1821.

An appeal was brought accordingly; and leave was given to the heir at law to present a cross-appeal, on the ground that the dispositions of the will were void for uncertainty. For the cases on the appeal and cross-appeal. See *Cases on Appeals in the House of Lords*, Lincoln's Inn Library, vol. xxv. p. 472. &c.

On the hearing of the appeal and cross-appeal, two questions were referred to the Judges, which were, in substance; first, whether on the supposition that the dispositions of the will had been legal instead of equitable, a great-grandson claiming through males exclusively, would be entitled to nominate, in preference to a great-grandson claiming through a female, both being adult; and secondly, whether on the supposition that both great-grandsons claimed through males, an adult claiming through a younger son, would be entitled to present, in preference to an infant claiming through an elder son.

The Judges certified on the first question in the affirmative, and on the second in the negative.

The above order was made by the House of Lords on their certificate.

The cause was afterwards set down for further directions in the Court of Chancery, and the bill was dismissed, and the costs of all parties directed to be paid out of the estate. S. C. L. C. 1st July, 1825.]

(1) After hearing the unanimous opinion of the Judges upon two questions of law to them proposed, and due consideration had, on Tuesday the 17th day of May last, and on Monday last, and this day, of what was offered on both sides in these causes, it is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the said cross-appeal be, and the same is hereby dismissed this House; but with liberty to the Court of Chancery to make any such order respecting costs, as to that Court shall seem just. And in the said original appeal, it is declared that the plaintiff in the Court below was not entitled to any relief by his bill. And it is further ordered that the cause be remitted back to the Court of Chancery (2) to proceed as the justice of the case consistently with this declaration may require, both as to relief and costs. *Oddie v. Woodford*, H. of L. 23d June, 1825. M.S.

For orders on appeals in the House of Lords. See Brown's Parliamentary Cases, *passim*.

NOTES.

(1) See Recitals, No. I. Note (1), *ante*.

(2) On Writs of Error the House of Lords itself pronounces the judgment; on appeals it gives direction to the Court below to rectify its own decrees. 3 Bl. Com. p. 55.

In the latter case, the order of the House of Lords must be made a rule of the Court of Chancery. *Attorney-General v. Scott*, 1 Ves. 419. This will be done on motion, as of course upon the production of the order signed by the Clerk of Parliament. Harr. 351. So in the Exchequer, 2 Fowl. 251.

For orders for this purpose. See Hand's Pract. 124. Equity Draftsman, 625.

Whether, where the decree is affirmed by consent, the order of the House of Lords should be made a rule of the Court. Q. *Attorney-General v. Scott*, *supra*.

ORDERS RESPECTING DRAWING UP DECREES.

No. I.

ORDER FOR ENTERING DECREE NUNC PRO TUNC.

Upon consideration this day had, by the Right Honourable the Master &c. of the humble petition of the plaintiff, shewing that &c. the plaintiff exhibited his bill to have the benefit of a decree made in another cause, by which it was ordered that &c. That the cause upon the plaintiff's bill came on to be heard before the Lord Chancellor the 5th of July, 1736, &c. by which it was directed that &c. That the plaintiff caused the said decree in this cause to be drawn up, but did not proceed to get it passed, by reason the account directed in the said other cause was then depending, and the master has but lately made his report in that cause, and &c. Wherefore the plaintiff is desirous to proceed in this cause; but by reason of the length of time since the decree was pronounced, the Registrar refuses to pass the same. It is thereupon ordered that the Registrar do pass the said decree, and that the same be entered *nunc pro tunc*, but notice is first to be given to the defendant's Clerk in Court. *Scarth v. Cotton*, 22d January, 1748. Reg. Lib. B. 1747. fol. 51.

For like orders. See Hand's Pract. 239.

NOTE.

Drawing up Decrees.

Minutes.

Where the decree is pronounced by the Court, the minutes of it are taken down by the Registrar. Harr. 321.

Orders respecting drawing up Decrees.

It was formerly the practice for the Registrar to read over the minutes to the Court, *Ib.* And see Order 6th April, 1687. Beames, 270.

Passing and Entering.

The decree is drawn up by the Registrar from the minutes. *Harr.* 321.

A time is then fixed by him for passing (*i. e.* settling) it, of which the parties have notice, *Ib.*

In the Exchequer the plaintiff is allowed one term and a vacation to draw up the decree, but the vacation must be that of the term in which the decree is pronounced. If not drawn up by the plaintiff within that time, leave will be given to the defendant to draw it up. *Calvert v. Dignum*, 4 Price, 133.

When passed, it is signed by the Registrar. *Harr.* 321. It is then entered in the Registrar's book. *Ib.*

By an order of the 4th of December, 1691, Beames, 290. the time for entering decrees is restricted. So by an order of the Exchequer. See Rules and Orders of the Exchequer, 31. But where the party entitled to the order comes recently, leave may be obtained to enter a decree *nunc pro tunc* as of course. *Harr.* 322. *Scarth v. Cotton*, *supra*.

But after a length of time there ought to be notice of the motion. *Anon.* 3 Atk. 521. And see *Gilb. For. Rom.* 163.

An order to enter the decree *nunc pro tunc* will not be made after the abatement of the suit. *Bertie v. Lord Falkland*, 1 Dick. 25.

The decree is binding from the time that it is pronounced; the subsequent acts relating to it are ministerial only. *Harr.* 324.

Lost Decree.

Where the original decree has been lost, it will be ordered to be drawn up from the minutes or from a copy, and entered *nunc pro tunc*. *Lawrence v. Richmond*, 1 J. & W. 241. *Down v. Lewis*, 11 Ves. 601. *Jesson v. Brewer*, 1 Dick. 370. And see *Williamson v. Henshaw*, 1 Dick. 129.

So where the enrolment has been burnt, a new enrolment will be directed from the exemplification or writ of execution. See *Jesson v. Brewer*, 1 Dick. 371. *Goddard v. Earl of Suffolk*, there cited.

Signing and Enrolling Decrees.

After the decree is passed and entered, a docket of it is prepared for the signature of the Lord Chancellor. *Harr.* 325.

Previous to the signature the docket must be examined by the Clerk in Court, with the record of the bill and other proceedings recited in it, *Ib.* And see *Gilb. For. Rom.* 210. And must be signed by the Six Clerk or his deputy. See Lord Clarendon's orders, *Beames*, 206. Orders of Commissioners, *Beames*, 112.

The docket is then signed by the Lord Chancellor. *Harr.* 325.

If the decree was pronounced by the Master of the Rolls (or Vice-Chancellor) it must also previously be signed by them. *Ib.*

The docket being signed, will be enrolled by the Clerk of the Rolls. *Ib.* 326. The decree is not to be enrolled until it has been signed. See Order of the 23d of January, 1646, *Beames*, 106.

The decree may be enrolled by a defendant. *Gartside v. Isherwood*, 2 *Dick.* 612. *Carrington v. Holley*, there cited. And see *Gore v. Purdon*, 1 *Sch. and Lefr.* 234.

And notwithstanding an abatement, *Harr.* 324. *Duchess of Buckingham v. Sheffield*, *Ambl.* 586. *S. C.* 1 *West*, 673.

A caveat may be entered by either party, which stays the signing and enrolment for twenty-eight days from the time of its being presented to the Lord Chancellor for signature, and notice given to the other side. *Burnet v. Theobald*, 1 *P. W.* 609. And see Order of the 17th June, 1698, *Beames*, 308.

The twenty-eight days are clear days. *Robinson v. Newdick*, 3 *Mer.* 13.

Decrees for account should not be enrolled. *Staunton v. Oldham*, 2 *Atk.* 383. And see *Anon.* 1 *Ves.* 326.

By an order of Lord Clarendon, *Beames*, 205. the time for the enrolment of decrees is restricted, but leave may be obtained to enrol the decree *nunc pro tunc* nearly as of course. See *Robinson v. Newdick*, 3 *Mer.* 14. *Gilb. For. Rom.* 189. It seems that in Ireland leave is unnecessary. *Tisdal v. Lady Charleville*, 2 *Sch. & Lef.* 392.

In strictness the docket ought not to be presented until the order for leave to enrol *nunc pro tunc* has been passed and entered *Robinson v. Newdick*, 3 *Mer.* 13. And see *Gilb. For. Rom.* 189. 190.

The enrolment of decrees is now much disused. See Lord Redesdale, 54.

In the Exchequer, decrees are not enrolled. See *Dodson v. Oliver*, 1 *Eagle & Younge*, 755.

Orders respecting drawing up Decrees.

Vacating Enrolment.

Where the merits have not been gone into, the enrolment may be set aside. See *Benson v. Vernon*, 4 Bro. P. C. 546. S. C. cited 1 Ves. 206.

As where the decree was obtained and enrolled through the neglect of the opposite solicitor. *Robson v. Cranwell*, 1 Dick. 61. *Kempe v. Squire*, 1 Ves. 205. S. C. 1 Dick. 131. And see *Pickett v. Loggan*, 5 Ves. 702. S. C. 14 Ves. 231.

So where the enrolment was obtained by surprise. *Stevens v. Guppy*, Turn. 178. *Parker v. Dee*, 3 Swan. 534. note.

So where it was obtained too quickly, though not irregularly. *Anon.* 1 Ves. 326.

But the enrolment will not be set aside where the decree has been obtained on the merits. *Charman v. Charman*, 16 Ves. 115.

It seems that a decree, signed and enrolled, cannot be set aside for fraud. See *Lord Redesdale*, 73. and cases cited in note.

Exemplification of Decree.

After the decree has been enrolled it may be exemplified. *Harr.* 336.

For the form of the exemplification. See *Harr.* 338.

The exemplification of the decree is evidence. *Harr.* 336. *Peake on Evidence*, 70. *Phillipps on Evidence*, 393.

As to the cases in which the decree can be given in evidence, without proof of the bill and answer. See *Peake*, *Ib.* *Phillipps*, *Ib.*

No. II.

ORDER TO RECTIFY MINUTES.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, by Mr. Attorney-General being of the counsel with the plaintiffs in the original cause, it was alleged that this cause received a hearing on the 9th of May last; and by the minutes then taken it was ordered that &c. That &c. and therefore it was prayed that the said minutes may be rectified, and that &c. Whereupon and upon hearing the minutes, and an affidavit of notice of this motion read, and of what was alleged by the plaintiff's counsel, it is ordered, that these words, "With &c." be added to the

minutes. *Rideout v. Payne*, L. C. 5th June, 1747. Reg. Lib. B. 1746. fol. 406.

For like order on petition. See Hand's Pract. 120.

Rectifying Decrees on Motion or Petition.

Before Decree passed.

Before the decree is passed and entered, the minutes may be rectified. Harr. 321.

In general the application should be made by petition. *Grey v. Dickenson*, 4 Mad. 464. *Brown v. Sansome*, 9 Price, 479. But it may be made by motion. See Harr. 321. *Webber v. Hunt*, 1 Mad. 13. *Punderson v. Dixon*, 5 Mad. 121. *Davies v. Morris*, 13 Price, 766. *Rideout v. Payne*, *supra*.

By the orders of the 5th June, and 9th July, 1725, Beames, 334. 337. the application should be made within a week from the hearing. And see orders of the 9th of August, 1721, and 6th April, 1687, Beames, 325. 270. But this is not attended to in practice.

The following proposition on this subject is among those subjoined to the report of the Commissioners on the practice of the Court of Chancery :—

Prop. 63. That no application shall be permitted to vary the minutes of any decree or order, unless the same be made within three weeks after the decree or order pronounced.

By the leave of the Court a point may be argued on a motion to vary the minutes. *Perry v. Phelps*, 1 Ves. jun. 251. And see *Bootle v. Blundell*, 1 Mer. 202.

After Decree passed.

After the decree is passed and entered, ordinarily it can only be altered on a rehearing, Harr. 322. And see Lord Redesdale, 71. *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 394.

Not, therefore, upon an original bill. See *Earl of Darlington v. Pulteney*, 3 Ves. 386. *Clinton v. Seymour*, 4 Ves. 465. *Davis v. Larnier*, 1 Dick. 42. *Wortley v. Birkhead*, 3 Atk. 809. S. C. 2 Ves. 571. Unless in a case of fraud. Lord Redesdale, 73. and cases cited in note.

Nor upon further directions. *Taylor v. Popham*, 15 Ves. 76. And see *Reservation of Further Directions, Usual Directions*, No. XV. *ante*.

Orders respecting drawing up Decrees.

Nor by petition. *Taylor v. Popham, supra.* Though in a case of fraud. *Mussel v. Morgan*, 3 Bro. 74.

Nor upon motion. *Anon.* 1 Ves. jun. 93.

But after the decree is passed and entered, it may be rectified in a matter quite of course on motion. *Wallis v. Thomas*, 7 Ves. 292. *Pickard v. Matheson*, 7 Ves. 293. *Newhouse v. Mitford*, 12 Ves. 456. *Lane v. Hobbs*, 12 Ves. 458. *Skrymsher v. Northcote*, 1 Swan. 573. note. *Tomlins v. Palk*, 1 Russ. 475. *Hawker v. Buncombe*, 2 Mad. 391. And see *Shine v. Gough*, 2 Ba. & Be. 33. *George v. Howard*, 7 Price, 661.

Where, however, new directions are required in consequence of the correction, the cause must be reheard. *Brookfield v. Bradley*, 2 S. & S. 64.

The Court refused to vary the decree on petition by giving costs to the defendant, though a mere trustee; and this notwithstanding the cause could not be reheard for costs. *Colman v. Sarell*, 2 Cox, 206.

So where an ejectment was ordered to be brought without restraining the defendant from setting up an outstanding term; an order for that purpose was refused on motion. *Brackenbury v. Brackenbury*. 2 J. & W. 391.

The Court will not vary a decree on motion without consent, except in a matter of mere clerical form. *Willis v. Parkinson*, 3 Swan. 233.

In *Wallis v. Thomas, supra*, the Lord Chancellor made an order for the purpose required, but did not alter the decree.

In *Lane v. Hobbs, supra*, the Lord Chancellor stated the mode of correcting the decree to be by a separate supplemental order.

In *Tomlins v. Palk, supra*, it was stated at the bar, that Lord Alvanley, in a similar case, directed the registrar to attend him in Court with his book, and that the alteration was then made in open Court, and countersigned by the judge. And the Lord Chancellor said that he would follow the same course. And see *Skrymsher v. Northcote, supra.* *Hawker v. Buncombe, supra.*

By Lord Lyndhurst's orders, 45. 2 Russ. Appendix, 17. it is ordered, that clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before enrolment be corrected upon petition, without the form and expense of a rehearing.

In the Explanatory Paper, subjoined to the Chancery Report, p. 115. it is said, that in these cases a rehearing was necessary by the former practice. But see the above cases.

After Enrolment.

After a decree has been signed and enrolled, ordinarily it can only be altered on a bill of review. Harr. 322. Lord Redesdale, 71. Lord Bacon's orders, Beames, 1. Taylor v. Sharp, 3 P. W. 371. Or by an appeal to the House of Lords, Harr. 348. And this, though enrolled by one only of several defendants. Gore v. Purdon, 1 Sch. & Lefr. 234.

But in case of miscasting or miscounting, where the matter demonstratively appears from the decree itself to be mistaken, it may be explained and reconciled by order. Harr. 322. P. R. by Wyatt, 155. Lord Bacon's orders, 2, Beames, 3. Gilb. For. Rom. 184.

By miscasting is to be understood, not any pretended misvaluing, but only error in the auditing or numbering. Ib.

Errors in the casting up of schedules apparent upon the face of them, were amended on motion after enrolment; but no amendment was permitted as to mistake alleged by affidavit. Weston v. Haggerston, Coop. 134.

In Yow v. Townsend, 1 Dick. 59. a mistake in a report whereby the Master had directed a sum to be paid to the defendant and her solicitor, instead of to the defendant, was amended after enrolment.

In Spearing v. Lynn, 2 Vern. 376. leave was given to amend the title of an order (which seems to have been enrolled), after an action brought against a surety for the non-performance of it. And see Lowten v. Mayor of Colchester, 2 Mer. 395. Bennett v. Button, 1 Dick. 135. S. C. 2 Mer. 400. note.

In Eyles v. Ward, 1 Dick. 58. S. C. Mos. 255. liberty was given to amend the enrolment of a decree, although the amendment was said to be material. And see Shine v. Gough, 2 Ba. & Be. 33. in which an alteration in the decree was permitted. Whether the decree had not been enrolled. *Qu.*

ORDERS RESPECTING EXECUTION OF DECREEES.

No. I.

ORDER FOR SERVICE OF WRIT OF EXECUTION OF DECREE ON CLERK IN COURT.

Upon motion this day made unto this Court by Mr. S., being of counsel with the plaintiffs, it was alleged, that it appears by the affidavit of N. H. that he did, on the 13th of January last, go to the defendant's house, in order to serve him with a writ of execution under the seal of this Court, of a decree made in this cause, the 21st day of February 1746, and also of a report, &c. and was then informed, by a woman at the said house, that &c. and that the said H. had inquired of the solicitor and clerk in court for the defendant in this cause, where the defendant might be met with, in order to serve him with the said writ of execution, but they could not tell any thing of him. And therefore it was prayed, that service of a writ of execution of the said decree &c. on the defendant's clerk in court may be good service thereof on the said defendant, which, upon reading the said affidavit, is ordered accordingly. *Holloway v. Dunbar*, M. R. 22d March, 1748. Reg. Lib. A. 1747. fol. 217.

NOTE.

Execution of Decrees.

At law, execution being considered as a satisfaction to the party, the plaintiff must elect between that against the person and that against the lands and goods. See *Tidd's Pract.* 1010.

But in equity, execution being given on the ground of contempt of the Court, the plaintiff may take out execution against the person,

and against the lands and goods at the same time. See *Horn v. Horn*, Ambl. 79. *Morrice v. Bank of England*, 3 Swan. 575. *Perryman v. Dinham*, 1 Ch. Rep. 152.

Where a party is taken upon an attachment or other process, for the non-performance of a decree, he will not be discharged, but upon compliance with it, and payment of costs. See 1 Turn. Pract. 325. 624. *Collins v. Crumpe*, 3 Mad. 390.

Where the property sequestered is insufficient to satisfy the decree, the process against the person may be revived. *Barnesly v. Powel*, 1 Dick. 130.

The death of a party in custody, under process for non-performance of decree, does not discharge the debt. See *Mildred v. Robinson*, 19 Ves. 585.

If any of the processes are irregularly issued, they may be discharged.

For orders to examine into regularity of process. See Harr. 517.

For writs of supersedeas of processes. See App. to Reg. Brev. 57.

A decree which is indefinite in its directions (as that the plaintiff should take upon himself certain debts) will not be enforced. *Broomhead v. Smith*, 8 Ves. 357.

What follows relating to the processes of contempt is confined principally to the order in which they follow, the mode of obtaining them, their forms, and in what respects they differ from those on mesne process.

Ordinary Process.

Writ of Execution.

Ordinarily the mode of enforcing a decree or order is by a writ of execution of it. See Harr. 331. 513.

For a writ of execution of a decree. See Harr. 334.

For a writ of execution of an order. See Harr. Ib.

The writ is issued by the clerk in court without an order. 1 Turn. Pract. 97.

Formerly it was held to be necessary, that previously to the issuing the writ, the decree or order should be enrolled, Harr. 331. Gilb. For. Rom. 165. 171.

But since the enrolment of decrees has become disused, (See Lord Redesdale, 54.) it seems that this is not now necessary.

Formerly the whole of the decree was inserted in the body of the writ. See Gilb. For. Rom. 191.

Orders respecting Execution of Decrees.

But by an order of Lord Coventry, Beames, 76. unless the party suing out the writ desired that the whole of the decree should be recited in it, a shorter mode of drawing writs of execution was prescribed.

For short writ of execution. See Harr. 335. Curs. Canc. 375. App. to Reg. Brev. 46.

Nevertheless, an order was held to be necessary to warrant a short writ of execution. See Parkins v. Morris, 2 Dick. 690. But see Harvey v. East India Company, Prec. in Ch. 131. S. C. 2 Vern. 395.

By the writ of execution compliance was usually directed immediately. See Harr. 335. Curs. Canc. 375. App. to Reg. Brev. 46.

But the Court frequently fixed a time for compliance by the order. See Parkins v. Morris, *supra*. And see Directions for Payment or transfer by Party, Usual Directions, No. VIII. *ante*.

Hence has arisen the modern practice of enforcing decrees, by obtaining an order for compliance within a limited time. And upon default an order for commitment. See Short Process, No. V. Note, *post*.

In the Exchequer the decree is annexed to the writ of execution, not inserted in it. See Gilb. For. Rom. 191.

Service of Writ.

Generally, in order to found process of contempt upon it, the writ must be served personally. Harr. 331. 1 Turn. Pract. 97. 244. And see Ellison v. Pickering, 8 Ves. 319.

But this may be dispensed with under special circumstances; as where the party is present in Court when the decree is pronounced, an order may be obtained that service on his clerk in Court may be good service. Rider v. Kidder, 12 Ves. 202. And see Skip v. Harwood, 3 Atk. 565.

So where a party absconds. Holloway v. Dunbar, No. I. *supra*. De Manneville v. Manneville, 12 Ves. 203. Edwards v. Poole, there cited. Anon. 4 Mad. 462. And see Dene v. Abell, No. VIII. *post*.

Where the wife absconded, an order was made that service on the husband, or any of the family, should be sufficient. Clarke v. Greenhill, 1 Dick. 91.

Where the order is for payment of money, and the party absconds, it should also be served at the dwelling-house. Farrow v. White, 1 J. & W. 643. And see Tyssen v. Ward, 1 Dick. 166.

Where the decree is not for payment of money, service at the dwelling-house is sufficient. *Wyatt*, P. R. 205.

So in some cases, if the writ is left with a servant, and appears to have afterwards come to the hands of the party, it will be sufficient. *Wyatt*, P. R. 208.

Where the clerk in Court of a party absconding is dead, an order will be made that service of a subpoena to name a new clerk in Court on the solicitor of the party may be good. *Francklyn v. Colhoun*, 12 Ves. 2. and cases there referred to. *Ratcliff v. Roper*, 1 P. W. 420.

For service of orders. See *Harr.* 513. *Hand's Pract. Preliminary Observations*, 13.

And see *Mode of enforcing Injunction*, No. XIV. Note, *post*.

Costs of Writ of Execution.

If the writ is complied with, the costs of it must be paid by the party issuing it; but if an attachment issues, the party against whom it is issued, must pay the costs of his contempt, including those of the writ of execution. See *Parkins v. Morris*, 2 Dick. 690. *Collins v. Crump*, 3 Mad. 391. *Beames on Costs*, 245.

The following proposition on this subject is among those subjoined to the *Chancery Report*:—

Prop. 149. That where a writ of execution of a decree or order is duly issued, the party charged by the decree or order shall in all cases pay the costs of the writ of execution, although it shall not become necessary to issue an attachment to enforce obedience thereto, such costs to be certified by the clerk in Court of the party to receive the same.

Attachment.

Upon affidavit of service of the writ of execution of the decree, and default, an attachment issues. *Gilb. For. Rom.* 191. And see *Harr.* 116. 333. 1 *Turn. Pract.* 244. 325. 624. *Bowes v. Lord Strathmore*, 12 Ves. 325. *Collins v. Crumpe*, 3 Mad. 390.

Formerly no attachment or other process issued without order. See *Orders* 26th April, 1647, *Beames*, 113. 27th May, 1687, *Beames*, 273.

But now the ordinary processes of contempt, viz. attachment, attachment with proclamations, and commission of rebellion, issue without order. *Gilb. For. Rom.* 81. *Edwards v. Pool*, 2 Dick. 693.

Orders respecting Execution of Decrees.

Formerly the affidavit was not required to be filed before the return of the process. Anon. 1 Vern. 172. Read v. Ward, 1 Dick. 76.

But now it is required to be filed before the process is issued. Broomhead v. Smith, 8 Ves. 363. And see Order 23d January, 1629, Beames, 55.

The attachment must be entered in the registrar's book. Harr. 117. 123. 133. James v. Philips, 2 P. W. 657. Smith v. Thomson, 4 Mad. 179.

For writs of attachment. See Harr. 121. Appendix to Reg. Brev. 45.

It seems that the form is the same with that on mesne process, but that the indorsement explains the purpose. See Harr. 122.

So in the case of an attachment for non-payment of costs. Harr. Ib.

There must be fifteen days between the teste and the return of this, and the other ordinary processes of contempt, unless an order is obtained that they may be returnable immediately. Harr. 117. 127. 133.

It seems that an attachment for non-performance of a decree is notailable. See Harr. 120.

If the sheriff permits a party taken upon an attachment for non-payment of money to go at large, the sheriff will be ordered to pay the money. See Beames on Costs, 138. and cases there referred to.

Attachment with Proclamations.

Upon the return of *non est inventus* to the attachment, an attachment with proclamations issues. See Harr. 127. 133. Gilb. For. Rom. 191.

The attachment with proclamations issues without order. See Attachment, *ante*.

It must be entered with the registrar. Harr. 127. 133. And see Attachment, *ante*.

For writs of attachment with proclamations. See Harr. 127. App. to Reg. Brev. 46.

It seems that the form is the same with that on mesne process, but that the indorsement explains the purpose. See Harr. *supra*.

For the time at which it is returnable. See Attachment, *ante*.

By Proposition 6, subjoined to the Chancery Report, the processes of attachment with proclamations and commission of rebellion, for not putting in an answer, are sought to be got rid of.

And see the recommendations contained in the first Report of the Commissioners upon the practice of the courts of law. Report, p. 87. 96.

Commission of Rebellion.

Upon the return of *non est inventus* to the attachment, with proclamations, a commission of rebellion issues. See Harr. 129. 333. Gilb. For. Rom. 191.

A commission of rebellion issues without order. See Attachment, *ante*.

A docket of it must be marked, as entered by the registrar. See Harr. 133.

In *James v. Philips*, 2 P. W. 657. note. it is said that a commission of rebellion only issues to the Sheriff of Middlesex. *Sed qu.*

For a commission of rebellion. See Harr. 132. Appendix to Reg. Brev. 47.

It seems that the form is the same with that on mesne process, but that the indorsement explains the purpose. See Harr. 132.

For the time at which it is returnable. See Attachment, *ante*.

It seems that a commission of rebellion for non-performance of a decree is not bailable. Harr. 129, 130. and note.

Serjeant at Arms.

Upon the return of *non est inventus* to a commission of rebellion, an order may be obtained for a Serjeant at Arms. See Harr. 134. 333. Gilb. For. Rom. 191. *Edwards v. Pool*, 2 Dick. 693. Order 12th June, 1694. Beames, 302.

This being a prerogative process, does not issue without order. Gilb. For. Rom. 81. *Edwards v. Pool*, *supra*.

The order is usually made on motion. See Harr. 134. Gilb. For. Rom. 81. Order 12th June, 1694, *supra*.

But it may also be made on petition. *Countess of Londonderry v. Cornthwaite*, 1 Dick. 285.

Upon the order being delivered to the Serjeant at Arms, he must procure a warrant, signed by the Lord Chancellor, for the apprehension of the party. Wyatt, P. R. 393.

For order for Serjeant at Arms on return of commission of rebellion on mesne process. See Harr. 520.

*Orders respecting Execution of Decrees.**Sequestration.*

• Upon the return of *non est inventus* by the Serjeant at Arms, an order may be obtained for a sequestration. See Harr. 137. 333. Edwards v. Pool, 2 Dick. 693. 695. Order of the 13th of May, 1721, Beames, 322. Gilb. For. Rom. 191.

This being a prerogative process, does not issue without order. Edwards v. Pool, *supra*. Gilb. For. Rom. 81.

The order must be made on motion, not on petition. Lord Clarendon's orders, Beames, 215. Harr. 138.

Before the motion is made, the return must be filed. Floyd v. Nangle, 3 Atk. 569.

If the defendant is taken by the Serjeant at Arms, he is to be brought into Court, and turned over to the Fleet, and thereupon an order will be made for a sequestration as of course. Edwards v. Pool, *supra*. And see Rowley v. Ridley, 2 Dick. 624. Order of the 13th of May, 1721, *supra*.

So where he is brought up upon Habeas Corpus. See Habeas Corpus cum Causâ, *post*.

For writ of sequestration for non-performance of decrees. See Appendix to Reg. Brev. 52.

For writs of sequestration on mesne process. See Harr. 146, Appendix to Reg. Brev. 51.

For order for sequestration on mesne process in the Exchequer. See 1 Fowl. 172.

For writs of sequestration for non-performance of decree, and on mesne process in Exchequer. See 2 Fowl. 213. 1 Fowl. 174.

Effect of Sequestration.

Under a sequestration for non-performance of a decree, the property seized will be applied in satisfaction of the plaintiff's demand. Wyatt, P. R. 386. Davis v. Davis, 2 Atk. 24. 1 Newl. Pract. 386.

And see Form of Sequestration, Appendix to Reg. Brev. 52. Appendix (1).

Otherwise in the case of a sequestration on mesne process. See Harr. 139. Davis v. Davis, *supra*. 1 Newl. Pract. 84.

And see Form of Sequestration on Mesne Process, Appendix to Reg. Brev. 51. Appendix (2).

As to Personal Estate.

Under a sequestration for non-performance of a decree, an order may be obtained on motion, for the sale of goods seized under

it. See *Wharam v. Broughton*, 1 Ves. 184. But notice must be given of the motion. *Mitchell v. Draper*, 9 Ves. 208.

In *Sutton v. Stone*, 1 Dick. 107. an order was made for a sale of leasehold estates. But in *Shaw v. Wright*, 3 Ves. 23. a similar application was refused by the Lord Chancellor, on the ground that no title could be made. And see *Sutton v. Stone*, *supra*.

But under a sequestration on mesne process a sale will not be directed. *Wharam v. Broughton*, *supra*. *Hales v. Shafto*, 1 Ves. jun. 86. S. C. 3 Bro. 72. 2 Cox, 224. 2 Dick. 711. *Knight v. Young*, 2 V. & B. 184.

Except for payment of expenses, *Hales v. Shafto*, *supra*.

Unless the goods are of a perishable nature. See *Wilcocks v. Wilcocks*, Ambl. 421. *Shaw v. Wright*, *supra*.

In *Heather v. Waterman*, 1 Dick. 335. it was held, that a sequestration on mesne process was not to be executed. And see *Rowley v. Ridley*, 2 Dick. 625. But see what is said by the Solicitor-General, *arguendo*, in *Simmonds v. Lord Kinnaird*, 4 Ves. 738. And see *Rowley v. Ridley*, 3 Swan. 306. note. *Wilcocks v. Wilcocks*, *supra*. *Shaw v. Wright*, *supra*.

Whether a chose in action can be taken under a sequestration. Q. See *Simmonds v. Lord Kinnaird*, 4 Ves. 735. *M'Carthy v. Goold*, 1 Ba. & Be. 387. *Franklyn v. Colhoun*, 3 Swan. 276. *Johnson v. Chippindall*, 2 Sim. 55. And see *Dundas v. Dutens*, 1 Ves. jun. 196. S. C. 2 Cox, 235.

In *Fenton v. Lowther*, 1 Cox, 315. it was held, that the salary of an equerry could not be sequestered. But in *M'Carthy v. Goold*, *supra*, it was held, that a pension to the grantee and his assigns, might.

Whether the books of a corporation can be seized under a sequestration. Q. *Lowten v. Corporation of Colchester*, 2 Mer. 395.

As to Real Estate.

Upon a sequestration under a decree, sequestrators will be put into possession by injunction. *Earl v. Earl*, L. C. 17th May, 1700. Reg. Lib. A. 1699. fol. 365. *Pelham v. Duchess of Newcastle*, 3 Swan. 289. note. Whether they will not be put into possession by a writ of assistance without an injunction, Q. See *Mode of Compelling Delivery of Possession to Receiver*, No. IX. Note. *post.*.

And tenants will be ordered to attorn and pay their rents in arrear,

Orders respecting Execution of Decrees.

and growing rents, to sequestrators. See Order for Tenant to attorn to Sequestrators, No. XII. *post*. So on a sequestration on mesne process. See what is said by the Solicitor-General, *arguendo*, in *Simmons v. Lord Kinnaird*, 4 Ves. 738. *Rowley v. Ridley*, 3 Swan. 306. note.

It seems that at law, notwithstanding attornment, the tenant may dispute the title of the sequestrators, unless he has received possession from them. See *Cornish v. Searell*, 8 B. & C. 475.

On a sequestration under a decree, leave will be given to the sequestrators to let. *Harvey v. Harvey*, 3 Ch. Rep. 87. *Neale v. Bealing*, 3 Swan. 304, note. And see *Dunkley v. Scribnor*, 2 Mad. 443.

But not on a sequestration on mesne process. *Ray v. ———*, 3 Swan. 306, note. *Bray v. Hooker*, 2 Dick. 638.

Sequestrators under an interlocutory order for performance of a duty, have the same power as under a final decree. *Cadell v. Smith*, 3 Swan. 308. note. And see *Dunkley v. Scribnor*, *supra*.

Time from which Sequestration is binding.

Where the suit directly relates to lands, or the profits of them, the lands are bound from the filing of the bill. *Crofts v. Oldfield*, 3 Swan. 278. *Bird v. Littlehales*, 3 Swan. 299, note. And see *Worsley v. Earl of Scarborough*, 3 Atk. 392.

And *à fortiori* by the decree. *Bird v. Littlehales*, *supra*. *Self v. Madox*, 1 Vern. 459.

But where the suit only relates to the lands collaterally, the lands are not bound till sequestration. *Crofts v. Oldfield*, *supra*. And see *Worsley v. Earl of Scarborough*, *supra*.

Where the suit is for a personal demand, the land is not bound until a sequestration. *Bird v. Littlehales*, *supra*. *Hamlyn v. Ley*, 3 Swan. 301, note. S. C. 1 Dick. 94. And see *Coulston v. Gardiner*, 3 Swan. 279, note.

Otherwise where the object of the sale is to defeat the sequestration. *Witham v. Bland*, 3 Swan. 276, note. And see S. C. 277. note. *Coulston v. Gardiner*, *supra*. *Bird v. Littlehales*, *supra*. *Hamlyn v. Ley*, *supra*.

A sequestration binds from the time of awarding the commission, not from the execution of it. *Burdett v. Rockley*, 1 Vern. 58.

Revival of Sequestration.

In *Burdett v. Rockley*, 1 Vern. 58. 118. it was said that a sequestration on mesne process determined by the death of the party; but

for non-performance of a decree did not. And
3 Atk. 593. Marquis of Carmarthen v. Haw-

ton, 1 Ves. 180. S. C. 1 Dick. 137.

for non-performance of a decree
iff or the defendant. And see

2. Ridley v. Rowley, 2 Dick.

being revived the sequestration may be

v. Broughton, *supra*. And see Hyde v. Green-

Ridley v. Rowley, *supra*. Coulston v. Gardiner,

S. C. 3 Swan. 283. note.

so upon mesne process. Hyde v. Forster, 1 Dick. 132.

Where the decree is for a personal demand, the sequestration cannot be revived against the heir. See Burdett v. Rockley, *supra*. University College v. Foxcroft, 1 Vern. 166. S. C. 2 Ch. Rep. 244. Bligh v. Earl of Darnley, *supra*. Hyde v. Greenhill, *supra*. Witham v. Bland, 3 Swan. 276. note. 277. note. Gilb. For. Rom. 86.

Otherwise where the decree is for a covenant in which the heir is bound. Gilb. For. Rom. *supra*.

Or in a case of fraud. See Time from which Sequestration is binding, *ante*.

Upon the abatement of the suit the Court will not immediately turn the sequestrators out of possession, but allow a reasonable time for reviving it. White v. Hayward, 2 Ves. 464.

Discharge of Sequestration.

A sequestration is discharged by the appointment of a receiver. Shaw v. Wright, 3 Ves. 22.

Habeas Corpus.

Habeas Corpus cum Causâ.

Upon the return of *cepi corpus* to an attachment or other common process for the non performance of a decree, a *habeas corpus* may be obtained to bring the party to the bar of the Court. See Harr. 124. 333. Bowes v. Lord Strathmore, 12 Ves. 325. Dunkley v. Scribner, 2 Mad. 443.

The writ issues by order which is made on motion or petition, but usually on motion. Harr. 124.

For order for *habeas corpus* on mesne process. See Harr. 518.

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For writ of *habeas corpus* to the sheriff. See Appendix to Reg. Brev. 54.

For a writ of *habeas corpus* to the Warden of the Fleet. See Harr. 126.

The writ (like the writ of *habeas corpus ad faciendum et recipiendum*. See Tidd's Pract. 350.) is frequently termed *habeas corpus cum causa*. See Harr. 125. *Elvard v. Warren*, 2 Ch. Rep. 151. 192. *Kinsey v. Yardley*, 1 Dick. 265. Order in *Pope v. Ward*, 1 Cox, 194. *Dunkley v. Scribnor*, *supra*.

But it seems that this term was formerly applied to a *habeas corpus* for the removal of the cause, as well as the party. See Vin. Abr. Habeas Corpus, (H).

If the writ is not obeyed an *alias* and a *pluries* issue. See Harr. 124.

For writ of *pluries*. See Appendix to Reg. Brev. 54. And see Harr. 126.

Upon the party being brought up, an order will be made for his commitment to the Fleet. *Elvard v. Warren*, *supra*. *Kinsey v. Yardley*, *supra*. And see *Rowley v. Ridley*, 2 Dick. 624. *Dunkley v. Scribnor*, *supra*.

So where the party is in custody under the process of another court, he must be brought up by *habeas corpus*, and turned over to the Fleet charged with the matters he was before charged with. See Harr. 125. *Bowes v. Lord Strathmore*, *supra*. Order in *Pope v. Ward*, *supra*.

So where the party is in custody under a criminal process, he may be brought up by *habeas corpus*, and turned over to the Fleet *pro forma*; but in that case he must be remanded to his original custody. *Bowes v. Countess of Strathmore*, 2 Dick. 711. *Moss v. Brown*, 1 V. & B. 78. And see Tidd's Pract. 351. But see S. C. 1 V. & B. 306. *Rogers v. Kirkpatrick*, 3 Ves. 471. 573.

The motion may be made as soon as the attachment is lodged with the Marshall and before the return of it. *Trotter v. Trotter*, Jac. 533.

Whether where the party is already in the custody of the Warden of the Fleet under the process of another Court, a *habeas corpus* is necessary, *Qs.* See *Const v. Barr*, 2 Russ. 161, and cases there cited. S. C. 2 S. & S. 452. *Errington v. Ward*, 8 Ves. 314.

Upon the certificate of the Warden of the Fleet that the defendant

is in his custody, a sequestration may be obtained. See order in *Pope v. Ward, supra*. *Elvard v. Warren, supra*. *Kinsey v. Yardley, supra*. *Bowes v. Countess of Strathmore, supra*. *Dunkley v. Scribnor, supra*. Harr. 125. 333. Gilb. For. Rom. 191. And see *Rowley v. Ridley, supra*.

That a sequestration issues on motion only. See *Sequestration, ante*.

For order for sequestration on certificate of Warden of the Fleet. See *Pope v. Ward, supra*.

Where the party was taken upon an attachment, and turned himself over to the Fleet, a sequestration could not issue before the return of the attachment. *Martin v. Kerridge*, 3 P. W. 240.

By Propositions 5, 7, and 8, subjoined to the Chancery Report, the processes of bringing the defendant to the bar of the Court by *habeas corpus, alias, pluries, &c.* upon the return of *cepi corpus*, to an attachment, with a view to taking the bill *pro confesso*, are sought to be got rid of.

Messenger.

Upon the return of *cepi corpus* to an attachment, or other ordinary process of contempt for non-performance of a decree, an order may be obtained for a messenger. See *Anon. Prec. in Ch.* 331. *Holme v. Cardwell*, 3 Mad. 114. And see *Miles v. Lingham*, 7 Ves. 230. *Anon.* 2 Atk, 507. *Frederick v. David*, 1 Vern. 344. Harr. 135. *Wyatt*, P. R. 392.

The Messenger is one of the deputies of the Serjeant at Arms, who has several; those employed before a commission of rebellion are called messengers, those after by the name of their principal. Harr. 135. *Wyatt*, P. R. 391.

Formerly the Court allowed messengers to those particular jurisdictions only where the amercements went to the sheriffs themselves, and consequently the party was without remedy. Harr. 119. *Anon.* 2 Atk. 507. *Anon. Mos.* 305. *Anon.* 2 P. W. 301. *Anon.* 1 Vern. 116. Gilb. For. Rom. 70.

But it afterwards became the rule to send a messenger into every county generally, without any restriction. Harr. 119. *Anon.* 2 Atk. 507. And see *Gibbs v. Cotton*, 1 Vern. 154.

The order is made on motion as of course. Harr. 119. *Anon.* 2 Atk. 507.

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In *Wilkinson v. Belsher*, 2 Bro. 181. upon the return of *non est inventus* by the messenger, an order was made for a Serjeant at Arms.

But it seems that upon the return of the messenger, an order may be obtained for a sequestration. *Holme v. Cardwell*, *supra*. *Frederick v. David*, *supra*. And see Sequestration, *ante*.

It seems that upon a return of *cepi corpus* by the messenger, an order may be obtained for a commitment to the Fleet, and upon that an order for a sequestration. See Sequestration, *ante*.

APPENDIX (1).

[*Inter alia*] Et ideo vobis, tribus vel duobus vestrum, mandamus quod, certis diebus et horis ad hæc congruis et opportunis, ad maneria, terras, tenementa, et ad omnia et singula præmissa prædicta, accedatis, intretis et ingrediamini; ac omnes et omnimodos redditus, exitus et proficua quæcunque eorundem, et omnia et singula bona et catalla et status quæcunque prædictorum defendentium tam realia quam personalia in manus et possessiones vestras, trium vel duorum vestrum, capiatis, levetis, exigatis, recipiatis, et debito modo ad opus et usum dictæ Annæ Bedlingfield querentis, vel assignatorum suorum, de tempore in tempus, debito modo persolvatis et satisfaciatis, donec pecunia prædicta ut præfertur adjudicata et damagia inde dictæ querentis satisfacta fuerint, juxta tenores verasque intentiones seperialium ordinum prædictorum, quorum seperalem tenorem vobis mittimus per latorem præsentium. Teste R. &c.—Appendix to Reg. Brev. 52.

APPENDIX (2).

[*Inter alia*] Et ideo vobis, tribus vel duobus vestrum, mandamus quod ad certos dies et horas ad hæc congrua et opportuna, ad mesuagia, terras, et tenementa et præmissa quæcunque præfati defendentis, accedatis, eaque intretis et ingrediamini; ac omnia et omnimoda redditus, exitus et proficua quæcunque eorundem cum arreragiis inde, ac omnia et singula bona et catalla et status quæcunque præfati defendentis, tam realia quam personalia, in manus et possessiones vestras, trium vel duorum vestrum, capiatis, petatis, levetis, exigatis et recipiatis, et debito modo ad opus et usum præfatæ querentis ut præfertur sequestretis, ac omni executioni præmissorum intendatis diligenter; ac quicquid præmissorum levabitur in manus et possessiones vestras, pro usu præfatæ querentis detineatis et conservetis

donec et quousque præfatus defendens, querimonie prædictæ perfectè responderit, dictaque curia nostra aliter ordinaverit in hâc parte specialiter, juxta vim formam veramque intentionem ordinis prædicti. Teste &c.—Appendix to Reg. Brev. 51.

No. II.

ORDER FOR PARTY TO BE EXAMINED PRO INTERESSE SUO. (1)

Upon opening the matter this day unto the Court by Mr. C. being of the plaintiff's counsel, it was alleged that a commission of sequestration having issued against the defendant William Ley for non-payment of the sum of £—— pursuant to an order made in this Court &c. That T. P. and H. R. two of the sequestrators named in the commission of sequestration took possession of a messuage &c. as part of the real estate of the said William Ley, since which Mr. E. Cove and Catherine his wife, claiming title to the said premises by virtue of a mortgage thereof made by the defendant Ley to the said Catherine, then Catherine Prestwood, have brought an ejectment in His Majesty's Court of Common Pleas against the said T. P. and H. R. for recovering possession thereof; and therefore it was prayed that &c. Whereupon and upon hearing Mr. C. of counsel for the said Cove and his wife, and upon hearing an affidavit of the said T. P. and H. R. read, and of what was alleged &c. it is ordered that all proceedings on the said ejectment be stayed (2). And that the said E. Cove and C. his wife do come and be examined *pro interesse suo* before Mr. S. one &c. And the plaintiffs are to file interrogatories for that purpose in a week before the said Master. *Hamlyn v. Ley*, L. C. 12th February, 1743. Reg. Lib. A. 1742. fol. 194. S. C. 1 Dick. 94. 3 Swan. 301. note.

NOTES.

(1) *Examination pro interesse suo.*

Where a party claims an interest in property sequestered, an order may be obtained that he may go before the Master and be examined *pro interesse suo*. *Hamlyn v. Ley*, *supra*. *Fawcet v. Fothergill*,

1 Dick. 19. S. C. 2 Dick. 541. *Cooper v. Thornton*, 1 Dick. 72. *Bowles v. Parsons*, 1 Dick. 142. *Hunt v. Priest*, 2 Dick. 540. Harr. 144. Gilb. For. Rom. 80.

The Master cannot inquire into the title to property sequestered without an order. *Anon.* 3 Swan, 311. note.

In *Kaye v. Cunningham*, 5 Mad. 406. it was held by the Vice-Chancellor, that an order for the examination of a party *pro interesse suo* could only be made upon his application, or by his consent. But see *Hamlyn v. Ley*, *supra*. And see *Bird v. Littlehales*, 3 Swan. 300. note. *Mitchell v. Draper*, 2 Mad. Ch. 245. note.

The order cannot be made until the return of the commission, *Lord Pelham v. Duchess of Newcastle*, 3 Swan. 290. note.

An order may also be obtained for an injunction. *Hamlyn v. Ley*, *supra*. And see *Johnes v. Claughton*, Jac. 573.

In case of delay the party will be ordered to put in his examination within a limited time. *Cooper v. Thornton*, *supra*. And see *Wharam v. Broughton*, 1 Ves. 180. S. C. 1 Dick. 137.

Where the right is clear, the Court will give relief, without compelling the party to go before the Master. *Dixon v. Smith*, 1 Swan. 457. And see *Attorney-General v. Mayor of Coventry*, 1 P. W. 308.

But a mortgagee must come in and be examined. *Hamlyn v. Ley*, *supra*. *Anon.* 6 Ves. 288.

So a party claiming by an adverse title. See *Angel v. Smith*, 9 Ves. 336. *Johnes v. Claughton*, *supra*.

Sometimes leave will be given to the party to proceed at law. *Attorney-General v. Mayor of Coventry*, *supra*. *Anon.* 6 Ves. 288. *Angel v. Smith*, *supra*. And see *Brooks v. Greathed*, 1 J. & W. 178.

In *Hunt v. Priest*, *supra*, the Court refused to interfere upon petition. But in *Walker v. Bell*, 2 Mad. 21. on the petition of mortgagees an order was made for reference to the Master to inquire into their title; and on the report a further order was made on petition.

Liberty will be given to a party to proceed *pro interesse suo*, in *forma pauperis*. *James v. Dore*, 2 Dick. 788.

The mode of proceeding is the same where the property is in the possession of a receiver. *Anon.* 6 Ves. 287. *Angel v. Smith*, *supra*. And see *Brooks v. Greathed*, *supra*.

See Order for Reference of Examination, No. II. *post*.

(2) See Decrees respecting Injunctions, No. XII. Note (3.)

No. III.

ORDER FOR REFERENCE OF EXAMINATION.

Upon the humble petition of Evans Cove and Catherine his wife, this day preferred to the Right Honourable &c. for the reasons &c. it is ordered that it be referred to Mr. S. one &c. to look into the interrogatories exhibited by the plaintiffs, pursuant to an order of the 12th of February instant, before the said Master, for the examination, &c. and also to look into the petitioners' examination put in thereto, and certify whether the petitioners have made out a title to the said premises or not. *Hamlyn v. Ley*, M. R. 9th June 1743. Reg. Lib. A. 1742. fol. 474. S. C. 1 Dick. 94. 3 Swan. 301. note.

NOTE.

Order for Reference of Examination.

When the examination has been put in, an order may be obtained for a reference to the Master, to see whether the party has made out his claim. *Hamlyn v. Ley*, *supra*. *Fawcet v. Fothergill*, 1 Dick. 19. S. C. 2 Dick. 541. *Cooper v. Thornton*, 1 Dick. 72. *Bowles v. Parsons*, 1 Dick. 142. *Hunt v. Priest*, 2 Dick. 540.

If the examination is not replied to, it will be conclusive. *Attorney-General v. Mayor of Coventry*, 3 Swan. 311. note. And see *Bowles v. Parsons*, 1 Dick. 143. note.

If the examination is replied to, leave will be given to either party to examine witnesses. See *Fawcet v. Fothergill*, *supra*. *Rowley v. Ridley*, 3 Swan. 308. note. *Harr.* 144. *Gilb. For. Rom.* 86.

Exceptions to Report.

Exceptions are sometimes taken to the report. See *Wharam v. Broughton*, 1 Ves. 181. *Belt's Supp.* 105. But this is irregular, and the matter should be set down upon the report. *Hamlyn v. Ley*, *supra*.

See Final Order, No. IV. *post*.

No. IV.

FINAL ORDER.

This cause coming this present day to be heard before the Right Honourable &c. on the special matter of the report made in this cause, by Mr. T. B. one &c. dated the 5th day of May last, in the presence of counsel learned, for Francis Powell and for the plaintiffs. And the matter in question being, whether the said Francis Powell is entitled to take the rents and profits of the lands comprised in a mortgage in the said report mentioned, until he is repaid the sum of £—— or not. And the said Master, by his report, certifying that &c. Upon debate of the matter, and hearing of the said report, an order dated &c. and affidavit of the said F. P. and the proofs taken in the cause read, and what was alleged by counsel for the said parties, his Lordship doth declare, that the said Mr. P. hath a just right and title to take the rents and profits of the lands and premises contained in the said mortgage, for the security of the principal and interest due on his mortgage, until he is repaid the same. And it is ordered, that the plaintiffs do pay unto the said P. his costs, from the time of the order of the 10th day of February last, made in this cause, to be taxed by the said Master. *Cooper v. Thornton*, L. C. 22d July, 1738. Reg. Lib. A. 1737. fol. 629. S. C. 1 Dick. 73.

NOTE.

Final Order.

Upon the Master's report a final order will be made. *Cooper v. Thornton*, *supra*. *Hamlyn v. Ley*, 1 Dick. 94. S. C. 3 Swan. 301. note. *Fawcet v. Fothergill*, 1 Dick. 19. S. C. 2 Dick. 542. *Bowles v. Parsons*, 1 Dick. 142. *Hunt v. Priest*, 2 Dick. 540. And see *Harr.* 144. *Gilb. For. Rom.* 80.

If the right of the party is established, he will be entitled to costs. *Cooper v. Thornton*, *supra*. *Hamlyn v. Ley*, *supra*. And see *Harr.* 144. *Gilb. For. Rom.* 80.

And he may obtain a reference, with a view to damages. *Copeland v. Mape*, 2 Ba. & Be. 67.

No. V.

SHORT ORDER FOR PAYMENT.

Upon opening of the matter this day unto the Court by Mr. H. of counsel for the relators, it was alleged, that by an order, dated the 4th day of August, 1814, it was referred &c. and that what the said Master should certify &c. should be paid by the defendant to the relators, the Right Honourable &c. That in pursuance of the said order the said Master made his report, dated the 31st day of January 1815, and thereby certified that &c. and that there was due from the defendant &c. and there not being any time limited by the above order for the defendant to pay what should be reported due from him, the relators cannot proceed to bring him into contempt; it was prayed that &c. Whereupon, and upon hearing an affidavit of notice of this motion read, this Court doth order, that the defendant, Giles Bailey Bennett, do, within three weeks from this time, pay the sum of £—— to Sir Nathaniel Duckinfield Baronet, one of the trustees of the charity in the pleadings mentioned. Attorney-General v. Bennet, V. C. 7th March, 1815, Reg. Lib. A. 1814. fol. 409.

For like orders. See Usual Directions, No. IX. *ante*.

NOTE.

Short Process.

Instead of going through the whole process by writ of execution, attachment &c. it became the practice, upon service of a copy of the decree and non-compliance, to order that the party should stand committed. See Gilb. For. Rom. 84. 86. 171. 200.

The commitment was to the Warden of the Fleet, and upon his return the Court ordered a sequestration. Gilb. For. Rom. 85.

But by an order of the 13th May, 1721, Beames, 322. the party was to be taken by the Serjeant at Arms. And see *Ex parte Jephson*, Prec. in Ch. 549. And upon the return of the Serjeant at Arms a sequestration was ordered. See Sequestration, No. I. Note, *ante*.

But this practice has only been adopted in particular cases. See Mode of compelling Payment by Party, *infra*. Mode of compelling Payment of Costs between Party and Party, *infra*. Mode of com-

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PELLING Production, No. VI. *post.* Mode of compelling a Party to put in Examination, No. VII. *post.* And, except in the two latter cases, it has not superseded the ordinary process.

It has also been adopted in the case of orders between persons not parties to the suit. See No. XIII. and Note, *post.*

And in the case of non-compliance with an injunction. See No. XIV. Note, *post.*

Mode of compelling Payment or Transfer by Party.

A short order may be obtained for payment or transfer within a limited time. Attorney-General v. Bennett, *supra.* And see 1 Turn. Pract. 97. 244. 324. 623. Rider v. Kidder, 12 Ves. 202. Collins v. Crumpe, 3 Mad. 390. And see Writ of Execution, No. I. Note, *ante.*

This may be enforced, by a writ of execution and the subsesequent processes. See 1 Turn. Pract. *supra.* Rider v. Kidder, *supra.* Collins v. Crumpe, *supra.* And see Ordinary Process, No. I. Note, *ante.*

Whether, upon service of the order and default, an order may be obtained, that the party may stand committed; *Q.* See Short Process, *supra.*

In the former case the writ of execution must be served within the time limited. See 1 Turn. Pract. 97. 244. 624.

Where this is not done, another order may be obtained for payment within a limited time. For further order. See Hand's Pract. 64.

Or the time may be enlarged. Farrow v. White, 1 J. & W. 645.

For order for enlarging time by consent. See Hand's Pract. 66.

Where money is directed to be paid into court within a limited time, and is not paid in by that time, the Accountant-General will not receive it without a further order. See 1 Turn. Pract. 325.

For further order. See Hand's Pract. 66.

And see Direction for Payment into Court. Usual Directions, No. X. *ante.*

Formerly the writ of execution directed payment to the plaintiff or the bearer. See Short Writ of Execution, Curs. Canc. 375. App. to Reg. Brev. 46. And see Gilb. For. Rom. 102. But where the order is for payment to the party, if the writ of execution is not served by the party himself, the person by whom it is served must have a power of attorney from the party to receive it. Harr. 331. Wyat, P. R. 205. 1 Turn's Pract. 623. And see Decrees respecting Mortgages, No. III. *ante.*

Otherwise where the party absconds, and the writ is served on the Clerk in Court. Wyatt, P. R. 207.

Whether, upon default of payment, the party may not be compelled to pay interest; Q. See Collins v. Crumpe, 3 Mad. 391. note.

It is the practice in Ireland to direct the payment of the sum at a certain day; and then in case of non-payment at that day, interest to accrue from the time appointed. Hamilton v. Houghton, 2 Bligh, 191. 186.

Where an order is obtained to pay money into the Bank at a given time, and is not acted upon, the Court will inquire whether there has been any former order; and if there has, will make the party shew cause why he should not pay interest. Higgins v. ———, 8 Ves. 382.

The like process may be resorted to, to compel the performance of an order upon a party to execute a recognizance. See De Manneville v. De Manneville, 12 Ves. 203.

Mode of compelling Payment of Costs between Party and Party.

Upon the Master's certificate of the amount, a subpoena for payment issues without order. See Beames on Costs, 249.

For certificates. See Hand's Pract. 269. 270.

For writ of subpoena for costs. See Harr. 194.

Upon affidavit of service and default, an attachment issues without order, and the subsequent process to a sequestration. Beames on Costs, *supra*. Pope v. Ward, 1 Cox, 194.

Whether upon default of payment an order may be obtained that the party may pay within a given time or stand committed, Q. See 1 Newl. Pract. 409. Beames on Costs, 248. note.

The subpoena should be served personally, but if the party absconds, an order may be obtained that service upon his Clerk in Court, or at his last place of abode, may be sufficient. Wyatt P. R. 406.

The Clerk in Court being dead, service on the solicitor of the party, and at his last place of abode, was ordered to be sufficient. Tyssen v. Ward, 1 Dick. 166.

The party serving the subpoena if not the party to whom payment is directed to be made, must have a power of attorney from him to receive it. Wyatt, P. R. 406.

Where a debt or legacy and costs are reported to be due and ordered to be paid to the same person, a writ of execution will cover the costs as well as the legacy or debt. Beames on Costs, 249.

The following propositions on this subject are among those subjoined to the Chancery Report :—

Prop. 148. That upon all orders for payment of costs or where a party is entitled to costs according to the course of the Court, there the party to pay the costs shall at the same time also pay the further costs occasioned by the process to enforce the payment of the costs; the amount of such further costs being certified by the Clerk in Court of the party to receive the costs.

No. VI.

ORDER TO COMPEL PRODUCTION OF DOCUMENTS UNDER DECREE.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, by Mr. E. being of the plaintiff's counsel, it was alleged that by the decree made in this cause the 8th day of March, 1741, it was amongst other things ordered, that the defendants E. P. and E. M. should produce &c. That the said defendants E. P. and E. M. have been duly served with warrants for that purpose, as by affidavit made before the said Master appeared, notwithstanding which they have not produced &c. as by the said Master's certificate dated this day appeared. It is therefore ordered, that the said defendants do produce before the said Master all books of account, papers and writings in their custody or power in four days after notice hereof to their clerk in Court, or in default thereof, that the Serjeant at Arms attending this Court do go against the said defendants, and bring them to the bar of this Court to answer their said contempt; whereupon such further order shall be made as shall be just. *Parsons v. Parsons*, L. C. 15th November, 1746. Reg. Lib. B. 1746. fol. 10.

For like orders. See Hand's Pract. 133. 134. Equity Draftsman, 604.

NOTE.

Mode of Compelling Production of Books &c. under Decree.

Formerly the party was to be served with a writ of execution of the decree, and at the same time with a warrant from the Master for the production. See Gilb. For. Rom. 165. But the production was afterwards compelled by warrant only. See Gilb. For. Rom. Ib. Harr. 476.

The books and papers required must be left by the party, with an affidavit of the same being all that are in his custody, or power, or that he ever had. Harr. 476. *Chicot v. Lequesne*, 1 Dick. 150.

For certificates of production. See Hand's Pract. 259, 260. 2 Turn. Pract. 76.

Further time for the production may be obtained if necessary. Harr. 476.

For orders for this purpose. See Hand's Pract. 132.

Upon the Master's certificate of the party's default, a motion may be made that he may produce them within four days, or that he may stand committed (called the four-day order). *Parsons v. Parsons*, *supra*. Gilb. For. Rom. 166. Harr. 476.

For certificates of non-production. See Hand's Pract. 258.

And upon further certificate of his default the order will be made absolute. *Carleton v. Smith*, 14 Ves. 181.

The certificate should bear date on the day of the motion. *Hopkinson v. Leach*, 3 Swan, 98. And see *Carleton v. Smith*, *supra*.

By order of the 29th October, 1692, Beames, 292. the certificate should be filed within four days. But it is sufficient if it is filed before the four-day order is delivered out. *Harris v. Detastet*, 1 S. & S. 263.

In the case of a commitment for non-production, the party is to be taken into custody by the Serjeant at Arms. *Parsons v. Parsons*, *supra*. And see *Edwards v. Pool*, 2 Dick. 693.

Upon the return of the Serjeant at Arms, a sequestration will be ordered. *Lupton v. Hescott*, 1 S. & S. 274, and cases in note. And see Sequestration, No. I. Note, *ante*.

In *Jones v. Powell*, *ex relatione* Mr. Tinney, on a motion to dispense with production upon giving inspection at the counting-

house, (as in the case of an interlocutory order for production) the Vice-Chancellor, Sir A. Hart, said that he had known such orders made, and directed an inspection, and that copies should be given at the defendant's expense; but the order was not drawn up.

No. VII.

ORDER TO COMPEL PUTTING IN EXAMINATION.

Forasmuch as this Court was this present day informed by Mr. W. being of the plaintiff's counsel, that the said defendants T. L. and E. L. have not put in their examination to the interrogatories exhibited before Mr. H. one of the Masters &c. pursuant to the decree made in this cause, though they have been duly summoned for that purpose, as by the said Master's certificate appears. It is thereupon ordered that the said defendants do in four days after personal notice hereof to their clerk in Court, put in their examination to the said interrogatories, or in default thereof, that the Serjeant at Arms attending this Court do take the said defendants into custody and bring them to the bar of this Court to answer their said contempt; whereupon such further order shall be made as shall be just. *Norris v. Le Neve*, M. R, 13th November, 1746. Reg. Lib. B. 1746. fol. 10.

For order for some of defendants to put in their examination within a week, to interrogatories exhibited by others. See *Hand's Pract.* 139.

NOTE.*Mode of compelling Party to put in his Examination.*

Formerly the party was to be served with a writ of execution of the decree, and at the same time with a warrant from the Master to attend and be examined. See *Gilb. For. Rom.* 165, 166. But it afterwards became the practice to serve warrants only. See *Gilb. For. Rom. Ib.* Harr. 475.

The Master will allow the party a reasonable time for putting in his examination, or an order a month's time may be obtained. Harr. 475.

For order for this purpose. See Hand's Pract. 138.

Where the examination is taken by commission, the time for its return is not limited by the order (as it formerly was) but is left to the Master. *Hairby v. Emmet*, 5 Ves. 683.

After three warrants, and the expiration of the time allowed, a motion may be made on the Master's certificate, that the party may put in his examination within four days, or that he may stand committed. *Norris v. Le Neve*, *supra*. Harr. 475.

For Master's certificate. See Hand's Pract. 263.

And upon certificate of his default the order will be made absolute. Harr. 475.

In case of a commitment for default in putting in examination the party is to be taken into custody by the Serjeant at Arms. *Norris v. Le Neve*, *supra*. Harr. 475.

If the party while the order is in the hands of the Serjeant at Arms, tenders his examination, the Master is bound to receive it, but the party must pay the costs of his contempt. *Anon.* 2 Mad. Chan. 500.

A party putting in an insufficient examination must pay the costs of it. *Hubbard v. Hewlett*, 2 Mad. 469.

On three insufficient examinations a motion may be made that the party may stand committed. Harr. 476.

A party in custody for not putting in his examination, may move to be discharged on clearing his contempt. Harr. 476.

If the examination is insufficient, the plaintiff not having accepted the costs, may proceed upon the old process; but he cannot keep the defendant in custody till the sufficiency of the examination shall be ascertained. *Bonus v. Flack*, 18 Ves. 287.

Upon the return of the Serjeant at Arms, a sequestration will be ordered. *Lupton v. Hescott*, 1 S. & S. 274, and cases in note. And see Sequestration, No. I. Note, *ante*.

No. VIII.

ORDER FOR INJUNCTION TO PUT PLAINTIFF INTO POSSESSION (1).

Upon motion this day made unto this Court by Mr. L. being of counsel with the plaintiff, it was alleged, that upon the

hearing of this cause the 3d of July last, it was ordered and decreed that the defendants should restore possession of the lands contained in a former decree in the pleadings mentioned to the plaintiff, and an injunction was awarded for quieting him in such possession, and the defendants were to account for the profits since their entry, and to pay the plaintiff his costs of this suit; which decree hath been since duly signed and enrolled. (2) That the plaintiff having made diligent search and inquiry after the said defendants to serve them with the writ of execution of the said decree, and they absconding and keeping out of the way on purpose to avoid such service, as by affidavit appeared, it was on the 25th of November last ordered, that service of the said writ of execution of the said decree upon the said defendant's clerk in Court should be deemed good service of the said defendants. (3) That the writ of execution of the said decree hath been accordingly served, and possession demanded by virtue of a letter of attorney, (4) and the defendants are now in contempt to an attachment (5) for breach of the said decree, and in not restoring possession, which they at first obtained by a forcible entry; it was therefore prayed that &c. Whereupon it is ordered that an injunction be awarded to enjoin the defendants and the tenants in possession of the said premises to restore the possession of the said premises in question to the plaintiff, pursuant to the decree in the cause. *Dene v. Abell*, L. C. 10th December, 1728. Reg. Lib. A. 1728. fol. 37. S. C. (*Done v. Holt*), cited 2 Dick. 620.

For like orders. See Harr. 522. Equity Draftsman, 624.

For writ of injunction to deliver possession. See Harr. 559. Curs. Canc. 370.

NOTES.

(1) See No. IX. Note, *post*.

(2) See Writ of Execution, No. I. Note, *ante*.

(3) See Service of Writ, No. I. Note, *ante*.

(4) See Mode of compelling Payment, No. V. Note, *ante*.

(5) See No. IX. Note, *post*.

No. IX.

ORDER FOR WRIT OF ASSISTANCE.

Whereas by an order of the 10th of December last, for the reasons therein contained, it was ordered that an injunction should be awarded to enjoin the defendants and the tenants in possession of the premises in question to restore the possession thereof to the plaintiff, pursuant to the decree in this cause; now upon opening of the matter this present day unto the Court by Mr. L. of counsel with the plaintiff, it was alleged that the defendants absconding, the plaintiff on the 19th day of December last went on the premises in question, and there found S. L. and Rebecca Abell, wife of Philip Abell, jun. son of the said defendant Abell, in possession, which they declared they kept for the defendant Abell, and served them, as also J. T. who was in possession of some part of the said premises, with copies of the said injunction, and at the same time demanded of them possession of the said premises, which they refused to deliver, as by an affidavit now read appears. It is thereupon ordered that a writ of assistance do issue, directed to the sheriff of the county of Devon, to put the plaintiff into possession of the premises in question, pursuant to the said decree. *Dene v. Abell*, L. C. 14th January, 1728-9. Reg. Lib. A. 1728. fol. 94. S. C. (*Done v. Holt*) cited 2 Dick. 620.

NOTE.

Mode of compelling Party to deliver Possession.

Upon service of the writ of execution of the decree, and default, an attachment issues without order, which is not executed, but only issued as a foundation for subsequent process. See *Dene v. Abell*, No. VII. *supra*. *Dove v. Dove*, 2 Dick. 618, 619. S. C. 1 Bro. 376. 1 Cox, 101.

Upon the issuing of the attachment an order will be made for an injunction to the party to deliver possession as of course. See *Dene v. Abell*, No. VIII. *supra*. *Dove v. Dove*, *supra*. Gilb. For. Rom. 86. 191. And see *Huguenin v. Baseley*, 15 Ves. 180. *Stribley v. Hawkie*, 3 Atk. 275.

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The injunction affects the tenant, which the order for delivery of possession does not. *Venables v. Foyles*, cited 2 Dick. 619.

Upon affidavit of service of the injunction and non-compliance, an order may be obtained for a writ of assistance on motion, without notice. *Dene v. Abell*, *supra*. *Dove v. Dove*, *supra*. *Huguenin v. Baseley*, *supra*. *Stribley v. Hawkie*, *supra*. *Roberdeau v. Rous*, 1 Atk. 544. S. C. 1 West, 566. *Pen v. Lord Baltimore*, 1 Ves. 454. And see *Harr.* 333. *Wyatt.* P. R. 207. *Eden on Injunctions*, 365.

For writs of assistance. See 2 *Harr.* 399. Edit. 1767. *Curs. Canc.* 373. Appendix to *Reg. Brev.* 46.

Sometimes, after the injunction, a commission was issued to put the party into possession. See Lord Bacon's orders, 9, Beames, 6. and note.

By Prop. 156. subjoined to the Chancery Report, the writ of injunction in the above process is sought to be got rid of.

Order in Case of Receiver.

The Court will put a receiver in possession in a summary way, and will grant him a writ of assistance, without first awarding an injunction. By Lord Parker, *Anon.* 3 P. W. 379. note.

Whether the like order would not be made in the case of a sequestrator. Q.

No. X.

ORDER FOR SEQUESTRATION MADE ABSOLUTE
AGAINST PEER.

Whereas by an order made in this Court on the 20th day of July, 1787, it was, among other things, ordered that the plaintiff Robinson Shuttleworth should, within three weeks from that time, pay into the Bank, with the privy &c. the sum of £—— reported due from the said plaintiff to the said defendant. And upon such payment being made, it was ordered that the defendant the Earl of Lonsdale should forthwith execute the re-conveyance of the mortgaged premises in question as settled by the Master, and deliver up to the plaintiff all deeds and writings in his custody or power, relating

thereto. And it was further ordered that service of the said order on the Clerk in Court for the said plaintiff, should be deemed good service on him. And whereas the plaintiff R. S. did pay into the Bank the sum of £—— pursuant to the said order, and the said defendant the Earl of Lonsdale was duly served with a writ of execution of the said order on the 16th day of November last, but did not execute the said re-conveyance, nor deliver up the said deeds and writings, or any of them. And thereupon by an order dated the 10th day of December, 1787, it was ordered that a commission of sequestration should issue directed to certain commissioners to be therein named, to sequester the said defendant's the Earl of Lonsdale's personal estate, and the rents and profits of his real estate, until the said defendant should execute the said re-conveyance, and deliver up the said deeds and writings pursuant to the said order of the 20th day of July, 1787, unless the said defendant, having personal notice thereof, should within eight days after such notice shew unto this Court good cause to the contrary. Now upon motion this day made unto this Court by Mr. L. of counsel for the plaintiff R. S. it was alleged that due notice has been given of the said order, as by affidavit appears, and that no cause is shewn to the contrary thereof as by the Registrar's certificate also appears. It was therefore prayed that the said order of the 10th day of December, 1787, may be made absolute; which is ordered accordingly. *Shuttleworth v. Earl of Lonsdale*, L. C. 9th July, 1788. Reg. Lib. B. 1787. fol. 485. S. C. 2 Cox. 47.

NOTE.

Mode of enforcing Decree against Peer or Member of Parliament.

Formerly an attachment lay against a peer; but now, by an order of parliament, no process lies against a peer but a sequestration. Anon. Comb. 62. And see Gilb. For. Rom. 66.

Upon service of the writ of execution, an order *nisi* may be obtained for a sequestration. See *Shuttleworth v. Earl of Lonsdale*, *supra*. *Crawley v. Clarke*, 3 Bro. 373.

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And upon affidavit of service, it will be made absolute. *Shuttleworth v. Earl of Lonsdale, supra.*

So against a Member of the House of Commons. See *Harr.* 143.

No. XI.

ORDER TO COMPEL PRODUCTION BY CORPORATION UNDER DECREE.

Whereas, by an order dated the 18th day of June, 1818, it was ordered that the said defendants, the Corporation of Winchester, should within four days after personal notice thereof to their Clerk in Court, put in their examination to the interrogatories exhibited before Mr. T. one &c. in pursuance of the decree made in this cause, or in default thereof, that a commission of sequestration should issue, directed to certain commissioners to be therein named, to sequester the said defendants' personal estate, and the rents, issues, and profits of their real estates, until they should put in their examination to the said interrogatories, or this Court make other order to the contrary. Now upon motion this day made unto this Court by Mr. T. of counsel for the relators, it was alleged that the said defendants' Clerk in Court hath been duly served with the said order as by affidavit appears; notwithstanding which the said defendants have not put in their examination to the said interrogatories, as by the said Master's certificate dated this day appears. It is thereupon ordered that a commission of sequestration do issue directed to certain commissioners to be therein named, to sequester the said defendants' personal estate, and the rents, issues, and profits, of their real estate, until the said defendants shall put in their examination to the said interrogatories, and this Court make other order to the contrary. *Attorney-General v. Corporation of Winchester, L. C. 22d June 1819. Reg. Lib. A. 1818. fol. 1289.*

NOTE.

See No. XII. Note, *post.*

No. XII.

ORDER FOR TENANTS TO ATTORN TO SEQUESTERS.

Upon motion this day made unto the Court by Mr. T. of counsel for the relators, it was alleged that by an order made in this Court, dated the 22d day of June, 1819, it was ordered that &c. That such commission issued accordingly. That it appears by the certificate of T. R. and R. B. two of the commissioners named in the said commission, that they have applied to G. M. &c. tenants under the said defendants to deliver up possession of the premises severally held by them, or to attorn tenants to the said commissioners; which they have refused to do. It was therefore prayed that the said several tenants named in the said certificate may be ordered to attorn tenants to the said commissioners of sequestration, and to pay their rents in arrear and growing rents to them; which, upon hearing the said order and certificate read, is ordered accordingly. *Attorney-General v. Corporation of Winchester*, V. C. 4th August, 1819. Reg. Lib. A. 1818. fol. 1832.

NOTE.

Mode of enforcing Decree against a Corporation.

Upon service of the writ of execution of the decree and default, a *distringas* issues without order. See Harr. 149. *Harvey v. East India Company*, Prec. in Ch. 128. S. C. 2 Vern. 395.

For writ of *distringas*. See Harr. 149. App. to Reg. Brev. 53.

The form is the same as that of the *distringas*, to compel appearance or answer; but the indorsement explains the purpose. See *Lowten v. Mayor of Colchester*, 3 Mer. 546.

Upon the return of the writ, an order *nisi* may be obtained for a sequestration as of course, without suing out an *alias* and *pluries*, as upon mesne process. See *Lowten v. Mayor of Colchester*, 3 Mer. 545. *Harvey v. East India Company*, *supra*.

And in default of cause being shewn, the order will be made absolute. *Lowten v. Mayor of Colchester*, 3 Mer. 546. *Harvey v. East India Company*, *supra*.

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For order for making order *nisi* for sequestration absolute. See *Harvey v. East India Company*, 3 Mer. 544. note.

Production or Discovery.

On the Master's report of the insufficiency of the examination, an order may be obtained for a sequestration, unless the examination is put in within four days; which, upon default, will be made absolute. *Attorney-General v. Corporation of Winchester*, *supra*.

And upon the certificate of the commissioners of their refusal, the tenants will be ordered to attorn, and to pay their rents in arrear and growing rents to the sequestrators. S. C.

Payment of Costs.

Payment of costs may be enforced by the same process as the decree, except that a subpoena for payment issues in the first instance, instead of a writ of execution. See *Lowten v. Mayor of Colchester*, 3 Mer. 543. 546. note.

For order *nisi* for sequestration for non-payment of costs. See *Lowten v. Mayor of Colchester*, 3 Mer. 546. note.

It appears by the order that an order was obtained for the subpoena for costs. But that the subpoena for costs issues without order. See *Mode of compelling Payment of Costs*, No. V. Note, *ante*.

No. XIII.

ORDER FOR PAYMENT OF COSTS TO SOLICITOR
BY CLIENT.

Upon opening this matter this present day unto the Right Honourable &c. by Mr. W. of counsel for Mr. W. F. it was alleged, that by an order made in this cause, bearing date the 14th day of December, 1811, it was ordered, that it should be referred to Mr. C. one &c. to tax the three several bills of costs in this cause, delivered to the said defendants by Messrs. B. & F. That in pursuance of the said order the said Master made his report, dated the 7th day of February, 1812, and thereby certified that &c. and two of the said bills of costs, amounting to the sum of £——, having been brought before him for taxation, the other having been settled between the parties, the said Master had taxed the same at

the sum of £——, whereout being deducted the sum of £—— paid by the said defendant on account of such costs, the same was reduced to the sum of £——, which was, by the said order, directed to be paid by the said defendant to the said Messrs. B. and F. or one of them. That it appears by the affidavit of W. F. that he did, on the 22d of April instant, personally serve the above-named defendant T. S. with the said report or certificate of the said Mr. C. bearing date &c. by delivering to and leaving with the said T. S. a true copy of such report, and at the same time shewed him an office copy of the said report; and that the said deponent then demanded of him the said T. S. the sum of £——, so directed by the said report, or certificate and order, to be paid to the said Messrs. B. and F. or one of them; and the said deponent was lately in co-partnership with Mr. B. but that such partnership was dissolved, and the money due to Messrs. B. and F. as mentioned in the said report and certificate, is now due to the said deponent on his own sole account; and that the said T. S. did not then pay, or hath he at any time since paid the same to the said deponent; and the same now remains due to the said deponent; and that the said T. S. hath not paid the said sum of money to the said Mr. B. the said deponent's late partner, as the said deponent had been informed and verily believed; and therefore it was prayed that &c. Whereupon and upon hearing the said order, dated the 14th day of December, 1811; the said report, dated &c. the said affidavit, and an affidavit of service of notice of this motion on the defendant read, and what was alleged &c. his Lordship doth order that the said defendant T. S. do, within a week from this time, pay to the said W. F. the said sum of £——, or in default thereof that the said defendant do stand committed to his Majesty's prison of the Fleet. *Wilkins v. Stevens*, L. C. 27th April, 1812. Reg. Lib. B. 1811. fol. 634. S. C. 19 Ves. 117.

NOTE.

Mode of Proceeding not between Parties.

Where an order is made upon a person not a party to the suit, a writ of execution does not issue, but the mode of proceeding is by obtaining an order for compliance by a given day, and on default another order for compliance by another day, or that he may stand committed. See *Anon.* 14 Ves. 207. *Davies v. Cracraft*, 14 Ves. 144. *Vickers v. ———*, 3 Bro. 372. *M'Carty v. Gibson*, Mos. 40.

Notice must be given of the latter motion. In the matter of *Partington*, 6 Mad. 71. But see what is said by Mr. Beames, in *Exparte Davison*, 1 G. & J. 228.

Upon default the order will be made absolute. See *Davies v. Cracraft*, *supra*.

That in bankruptcy the intermediate order is not necessary. See *Exparte Davison*, 1 G. & J. 227.

The commitment is to the Fleet, not to the Serjeant at Arms. *Wilkins v. Stevens*, *supra*.

Service of an order against two solicitors who were partners, upon one of them, and at their office, is not sufficient. *Young v. Goodson*, 2 Russ. 255.

If the order is for payment of money the person serving the order must have an authority to receive it. *Wilkins v. Stevens*, *supra*. And see *Mode of compelling Payment*, No. V. Note, *ante*.

The following proposition on this subject is among those subjoined to the Chancery Report :—

Prop. 150. That in all cases where an order *nisi* is made that a person named do stand committed unless he do an act specified there, the costs of such order *nisi* shall be paid by such person, although he does the act in obedience thereto without further order, and whether such person be or not a party to the suit; such costs to be certified by the clerk in Court of the party to receive the same.

Mode of compelling Purchaser under Decree to complete his Purchase.

Formerly it was held that a purchaser under a decree submitting to forfeit his deposit could not be compelled to complete his purchase.

1 P. W. 745. And in Anon. 6 Ves. 513. it is
ord Chancellor that the deposit is the only hold which
has upon the purchaser. But the Court will compel a
er under a decree to complete his purchase. See Lansdown
derton, 14 Ves. 512.

For this purpose the report must be confirmed. Anon. 2 Ves. jun.
335. 2 Fowl. 320. If the purchaser neglect to confirm it, it may
be confirmed by the vendor. Chillingworth v. Chillingworth, 1 Sim.
291.

If the report has been confirmed by the purchaser, an abstract of
the title must be delivered to him. Hodder v. Ruffin, 1 Newl. Prac.
336. note.

But if the report has been confirmed by the vendor, it seems that
this is unnecessary. Sanders v. Gray, 1 Newl. Pract. 337. note.

An order must be obtained for a reference of the title, and if ne-
cessary, of the conveyance. See 1 Turn. Pract. 225. 2 Turn. Pract.
249. 2 Fowl. 320.

On the Master's report, an order must be obtained that the pur-
chaser may pay the purchase money into Court. See 1 Turn. Pract.
226. 2 Turn. Pract. 250.

And upon default an order that he may pay it or stand committed.
Lansdown v. Elderton, *supra*.

Discharge of Purchaser.

If the report is against the title the purchaser will be discharged.
1 Newl. Pract. 335.

So upon error shewn in the decree. Lechmere v. Brasier, 2 J. & W.
287.

And he will be ordered to be paid his costs out of the fund in Court.
Reynolds v. Blake, 2 S. & S. 117.

Or where there is no fund, by the plaintiff; but without prejudice
to the question how they are ultimately to be paid. Smith v. Nelson,
2 S. & S. 557.

Where the purchaser becomes incapable of completing, he will be
discharged, and the estate will be resold. Blackbeard v. Lindigren,
1 Cox, 205. Hodder v. Ruffin, 1 V. & B. 544.

For order by consent for discharge of purchaser, and for a resale.
See Hand's Pract. 153.

*Orders respecting Execution of Decrees.**Mode of compelling Payment of Costs between Solicitor and Client.*

When the bill is taxed, the solicitor may take out an attachment, and the subsequent process for the costs, upon the Master's certificate, without first taking out a subpoena. *Murphy v. Balderston*, Barn. 265. S. C. 2 Atk. 114. And see *Mode of compelling Payment of Costs between Party and Party*, No. V. Note, *ante*. But previously to taking out such attachment the client should be served with the order for taxation and the certificate. S. C.

For certificates. See *Hand's Pract.* 267. 268.

Or upon service of the order and Master's certificate, he may obtain an order for payment within a limited time, or that the client may stand committed. *Wilkins v. Stevens*, No. XIII. *supra*. And see stat. 2 Geo. 2. c. 23. s. 23.

The following Proposition on this subject is among those subjoined to the Chancery Report :—

Prop. 152. That whenever costs are ordered to be paid by a person who is not a party to a cause, or where an order is made in bankruptcy for the payment of costs, then the payment of such costs shall be enforced by subpoena and attachment, in like manner as the payment of costs is enforced against a party to a cause.

But whether the present process is not preferable, as more summary. Q.

No. XIV.

ORDER FOR COMMITTAL FOR BREACH OF INJUNCTION.

Upon opening of the matter this day unto this Court by Mr. B. of counsel for the plaintiff, it was alleged, that by an order dated the 14th day of March, 1815, it was ordered, that an injunction should be awarded to restrain the defendant George Hustwick, from leading or taking away &c. And it appearing by the affidavit of T. R. the younger, that the defendant was duly served with the said injunction, and by the affidavit of the said T. R. &c. that since the 6th day of April last, the said defendant hath ploughed, broken up &c. It was

therefore prayed, that &c. Whereupon and upon hearing Mr. H. of counsel for the defendant, and the affidavit of T. R. the younger, whereby it appears that he did serve the said defendant with a writ of the said injunction, by delivering to and leaving with the said defendant a copy of the said writ, and shewing him the original, and the affidavits of T. R. the younger &c. read, and what was alleged &c. this Court doth order, that the said defendant George Hustwick do stand committed to his Majesty's prison of the Fleet. *Belt v. Hustwick*, V. C. 12th July, 1815. Reg. Lib. A. 1814. fol. 1165.

NOTE.

Mode of enforcing Injunction.

Breach of Injunction.

By the writ of injunction compliance is enjoined under a penalty. See Writ of Injunction, Harr. 556. But this cannot be enforced. See 4 Inst. 84. Curs. Canc. 368.

Formerly, upon affidavit of service of the writ, and of a breach of the injunction, an attachment issued. Harr. 552. Wyatt, P. R. 47. Gilb. For. Rom. 199.

But it afterwards became the practice to move that the party may stand committed. Harr. *supra*. Gilb. For. Rom. *supra*.

In Harr. 552. it is said, that service of the notice of motion on the clerk in court is sufficient. But in *Angerstein v. Hunt*, 6 Ves. 488. it was held, that it should be served personally. And see *Ellerton v. Thirsk*, 1 J. & W. 376. Gilb. For. Rom. *supra*.

In Harr. 552. it is said, that the Court usually gives the defendant a day to shew cause against the motion. But in *Angerstein v. Hunt*, *supra*, it was held, that the motion should be, not that the defendant may shew cause, but that he may stand committed. And see *Belt v. Hustwick*, *supra*.

Service of a copy of the writ, and shewing the original is sufficient without delivering the original. *Belt v. Hustwick*, *supra*. *Woodward v. King*, 2 Dick. 797. S. C. [*Woodward v. Earl of Lincoln*,] 3 Swan. 626.

But upon the motion to commit, the writ should be produced. *Ellerton v. Thirsk*, *supra*.

Service of the writ has, however, been dispensed with. As where

the party or his attorney have been present when the order was pronounced. *Anon.* 3 Atk. 567. And see *Skipp v. Harwood*, *Ib.* 565. But see what is said of these cases in *Pengree v. Jonas*, 2 Bro. 142.

Or about to be pronounced. *Osborne v. Tennant*, 14 Ves. 136. *James v. Downes*, 18 Ves. 524.

Or have had notice of the order. *Kimpton v. Eve*, 2 V. & B. 349. *Lewis v. Morgan*, 5 Price, 518. *Vansandau v. Rose*, 2 J. & W. 264.

Nevertheless, in such cases there must have been no delay in endeavouring to get the order drawn up, and the injunction under seal, and serving it when obtained. *Vansandau v. Rose*, *supra*. And see *James v. Downes*, *supra*.

Of late it has become the practice, in urgent cases, to direct that service of the minutes of the order should be sufficient. *Willis v. Yates*, L.C. 10th November, 1826. *Ex relatione Mr. Tinney*.

The commitment is to the Fleet. *Belt v. Hustwick*, *supra*. And see *Harr. supra*.

Although the injunction may not have issued regularly the party must obey it. *Woodward v. King*, *supra*. *Robinson v. Lord Byron*, 2 Dick. 703. And see *Marquis of Downshire v. Lady Sandys*, 6 Ves. 110. *Partington v. Booth*, 3 Mer. 149. *Drewry v. Thacker*, 3 Swan. 546.

So a writ of prohibition, though it may have improvidently issued, must be obeyed. *Iveson v. Harris*, 7 Ves. 255.

If the injunction goes beyond the terms in which other injunctions have been granted, or the reach of the principle, the party should apply to the Court to alter the terms of it. See *Marquis of Downshire v. Lady Sandys*, 6 Ves. 109.

But on an application against persons guilty of a breach of the injunction, the Court will give them the benefit of the fact, that the order ought not to have been made. *Drewry v. Thacker*, *supra*. And see *Partington v. Booth*, *supra*.

Where the breach has not been wilful, the parties will not be committed, but will be ordered to pay costs. *Bullen v. Ovey*, 16 Ves. 144. *Leonard v. Attwell*, 17 Ves. 386.

So where the injunction issued irregularly. *Partington v. Booth*, *supra*. And see *Drewry v. Thacker*, *supra*.

Upon a motion to commit for a breach of an injunction, in deviating from the line of a canal, if the line is disputed, an issue will be directed to ascertain it. *Agar v. Regent's Canal Company*, Coop. 77

Non-compliance with Injunction.

Where the injunction is to do an act, the course is to move for an order, that the party may do it by a particular day or stand committed. Harr. 552. Angerstein v. Hunt, 6 Ves. 488

The following sketch of the processes to compel performance of decrees and orders was suggested by that, as to mesne process, annexed to Mr. Bickersteth's examination before the Chancery Commissioners. See Chan. Rep. App. (A), 152.

the party or his attorney have been pronounced. Anon. 3 Atk. 567. And see But see what is said of these cases in

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Short Process (10).

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A D D E N D A.

Page 17, last line.

But the Master rarely exercises this authority, and the practice is to file interrogatories at the Examiner's office as in other cases. See 1 Turn. Pract. 171.

Page 54, line 29.

Page v. Newman, 9 B. & C. 54.

Page 72, at beginning of note.

Where legacies and annuities are directed to abate proportionally, a value will be set on the annuities at the death of the testator, and interest calculated upon it. Long v. Hughes, M. R. 26th February 1829. Reg. Lib. B. 1828. fol. 1028. Thorley v. Byrne, M. R. 4th March, 1829. Reg. Lib. B. 1828. fol. 1865.

Page 141, line 16.

Doe v. Wharton, 8 T. R. 2.

Page 141, line 32.

So where the tenant is in possession under a lease subsequent to the mortgage. Pope v. Biggs, 9 B. & C. 245.

Page 162, at end of note (1).•

The above form coincides with that used in the Exchequer. Hurd v. Partington. In the Exchequer, 5th July, 1822. Decrees in Exchequer, Trin. 1822. No. 27.

[The plaintiff was second mortgagee. .

Booth was third mortgagee, and assignee of the first mortgagee.

Bent was fourth mortgagee.

Shaw was assignee of the mortgagor under the Insolvent Act.

The decree is, that the plaintiff should redeem Booth as to the first mortgage, or that the bill should be dismissed.

If the plaintiff redeemed Booth, the right of redeeming the plaintiff is given successively—1st. to Booth in right of his third mortgage; 2d. to Bent; 3d. to Shaw; each in default of the other: in default, each to be foreclosed.

If Booth redeemed, the right of redeeming Booth is given successively, 1st. to Bent; 2d. to Shaw; each in default of the other: in default, each to be foreclosed.

If Bent redeemed in any of the above cases, the ultimate redemption is given to Shaw; or, in default, he is foreclosed.]

ERRATA.

Page 14, line 2, *for Tracey, read Tracy.*

34, 33, *for Street read Sweet.*

64, 26, *for Kirkman read Kirwan.*

86, 8, *for No. XI. read No. XII.*

87, 25, *for Prentice, read Prentis.*

107, 19, *for No. XIII. read No. XIV.*

110, 31, *for Newland read Newman.*

126, 12, *for Cooke read Cook.*

136, 10, *for 24th read 29th.*

— 11, *for fol. 119, read fol. 610.*

140, 8, *for No. IX. read No. X., and for No. X. read No. XI.*

142, 3, *for No. XVI. read No. XVII.*

153, 27 *for freehold read copyhold.*

172, 21, *for Orford read Oxford.*

173, 2, *for Bill on Sale read Sale on Bill.*

179, 15, *for bail read bill.*

219, 1, *for Barzelgetti read Bazzelgetti.*

222, 15 & 21, *for Barnsley read Barnesly.*

250, 12, *for Roberts read Robarts.*

262, 18, *for Darcy read D'Arcy.*

284, 21, *for Marlow read Marlar.*

300, 23, *for supported read superseded.*

306, 4, *for Smith read Smyth ; and line 14, for Brook read Brooke.*

320, 29, *for Jeffreys read Jefferys.*

364, 38, *for Hagden read Hayden.*

365, 21, *for Hagden read Hayden.*

399, 27, *for mayor read corporation.*

403, 19, *for Crump read Crumpe.*

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